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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 157.

THE SIOUX CITY & IOWA FALLS TOWN LOT AND LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. TREDWAY, JOHN M. TREDWAY, WILLIAM W. CURTIS, GEORGE EARLE, AND SAMUEL S. BURDETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 6, 1888.

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1 & 2 Be it remembered that on the 5th day of June, 1887, there was filed in the office of the clerk of the supreme court of Iowa by the appellant (pl'ff in error) a printed abstract, the same being in the words and figures following, to wit:

In Supreme Court of Iowa, March Term, 1887.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY, Appellant, *vs.* THOS. L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. Tredway, and John M. Tredway and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, Late Transacting Business as Land Attorneys in Washington, D. C., under the Firm Name of Curtis, Earle & Burdette, Appellees.	In Equity.

Appeal from Woodbury district court.

Appellant's Abstract of Record.

Joy, Wright & Hudson, attorneys for appellant; O. C. Tredway and Geo. Earle, att'ys for appellees.

3 On the 29th day of June, 1883, the plaintiff filed its

Petition in Equity

in the district court of Woodbury county against the defendants Thos. L. Griffey, Chas. Chamberlain, and O. C. Tredway, stating its cause of action in substance as follows:

I. That your petitioner, The Sioux City and Iowa Falls Town Lot and Land Company, is a corporation duly organized and doing business under the laws of the State of Iowa.

II. That your petitioner is the owner of and entitled to the present possession of the following-described real estate, situate in the county of Woodbury, Iowa, to wit: The northwest quarter of section 27, township 89 north, of range 47 west, of 5th P. M.

III. That the defendants wrongfully claim the possession of said premises from your petitioner and the paramount legal title thereto, and by force and violence are asserting their right to the possession of said premises.

IV. And your petitioner further shows that Congress, by an act approved May 15, 1856, entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State," granted to the State of Iowa, to aid in the construction of a railroad from the city of Dubuque, Iowa, to a point on the Missouri river, in said State, with a branch from the mouth of the Tete des Mort to the nearest point on said road, to be completed as soon as the main line was completed to that point, every alternate section of land designated by odd numbers for six sections in width on each side of said road. It was also further

enacted in the same act that in case it should appear that when the said line of road should be definitely fixed that the United States had disposed of the land so granted or any part thereof, then it should be lawful for any agent appointed by the governor of the State of Iowa to select, subject to the approval of the Secretary of the Interior, other lands in alternate sections, designated by
4 odd numbers and within fifteen miles of the line of said railroad, an amount equal to those so disposed of by the United States.

V. The General Assembly of the State of Iowa, by an act approved July 14, 1856, entitled "An act to accept the grant and to carry into execution the trust conferred upon the State of Iowa by an act making a grant of land to the State of Iowa in alternate sections to aid in the construction of railroads in said State," approved May 15, 1856, granted the lands mentioned in the fourth paragraph hereof to the Dubuque and Pacific Railroad Company, a corporation organized and incorporated under the laws of Iowa, upon the conditions contained in said act.

VI. The said Dubuque and Pacific Railroad Company, after the passage of the act of Congress last above mentioned, made a survey and location of the said line of railroad and caused a map thereof to be made and filed, as required by the said act of Congress, and the said line was so surveyed and staked out and definitely located along and upon the surface of the land through the county of Woodbury and past the land mentioned in the second paragraph of this petition on the 5th day of July, A. D. 1856, and thereupon the limits of said grant became and were definitely fixed and located, and upon the definite location of said line of road the right of the Dubuque and Pacific Railroad Company to select, have, and retain enough of the land within the fifteen-mile limits from said line to make out the full grant under the said act of Congress became absolute, and the right and title to the odd sections within the six-mile limits of the grant, including the land in suit, vested in the State of Iowa for the use of the railroad company constructing the line of road from Dubuque to Sioux City under the act of Congress of May 15, 1856.

VII. That at the time of the location of the Dubuque and Pacific railroad, as hereinbefore stated, a large amount of the lands in sections designated by odd numbers within six miles of said railroad as located had been sold or otherwise disposed of by the United States; that after the location of said road and in the
5 year 1856 the governor of the State of Iowa appointed one Bernhart Henn an agent, as provided in the act of Congress approved May 15, 1856, to select other lands from those undisposed of in sections designated by odd numbers between the six and the fifteen mile limits mentioned in said act of Congress in lieu of those previously disposed of within the six-mile limits.

That said agent, in pursuance of said appointment and by authority of said act of Congress, selected all the vacant and unappropriated lands in sections designated by odd numbers between the six and the fifteen mile limits of said railroad—said selections were completed in the month of September, 1856—which lands so selected,

together with those within the six-mile limits, were all required to make a full and complete grant of six sections to the mile, as contemplated by said act of Congress.

That on the 7th day of April, 1863, the Secretary of the Interior approved and certified said lands in suit to the State of Iowa under the act of Congress of May 15, 1856, for the use of said railroad company constructing the said railroad under the said grant.

VIII. That after said selections had been made, as stated in paragraph seven of this petition, the lists of lands so selected were properly made out and immediately filed in the office of the Secretary of the Interior; and the records of said office and those of the local land offices in the districts where the said lands were located showed the time of the location of said road through Woodbury county and past the land in controversy and the lists of lands so selected and claimed by the said company as enuring to it under the said grant.

IX. That in the year 1860 the Dubuque and Pacific Railroad Company conveyed to the Dubuque and Sioux City Railroad Company, a corporation duly incorporated and organized under the laws of the State of Iowa, the railroad then constructed by the Dubuque and Pacific Railroad Company, together with its franchises, ap-
6 purtenances, and the lands granted by Congress for the construction of said railroad, so far as the same remained undisposed of; that the said Dubuque and Sioux City Railroad Company, by reason of said conveyance, became entitled to the said lands granted by said act of Congress as aforesaid, which said land so conveyed included the land in controversy.

X. That Congress, by an act approved on the second day of March, 1868, entitled "An act extending the time for the completion of the Dubuque and Sioux City railroad," extended the time for the completion of said line of road from Dubuque to Sioux City until the first day of January, A. D. 1872.

XI. That prior to April 7, 1868, by a written contract with the Dubuque and Sioux City Railroad Company, the plaintiff acquired all the rights that the said Dubuque and Sioux City Railroad Company had in and to that portion of said land grant which had not been then earned by the construction of the said line of road. A copy of said contract is hereto attached, marked Exhibit "A," and made a part hereof.

XII. That the State of Iowa, by an act of the legislature approved April 7, 1868, chapter 124, Acts of the Twelfth General Assembly, entitled "An act to legalize, confirm, and carry out a contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company, and to extend the time for completing said railroad from Dubuque to Sioux City, to grant certain lands to the Dubuque, Bellevue and Sabula Railroad Company for the building of the Tete des Mort Branch, and for other purposes," ratified and confirmed the contract made between the said Dubuque and Sioux City and the Iowa Falls and Sioux City Railroad Companies, by which all the rights and franchises and the land grant conveyed to said Dubuque and Sioux City Railroad Company as aforesaid to aid in the construction of said road were trans-

ferred to the Iowa Falls and Sioux City Railroad Company, excepting such land as had been earned by the said Dubuque and Sioux City Railroad Company by reason of the road by it con-
7 structed, and by said act granted to the Iowa Falls and Sioux City Railroad Company, upon the terms, conditions, and restrictions in said act contained, all the lands granted by said act of Congress aforesaid that had not been earned and appropriated by reason of the road already constructed, which unappropriated lands embraced and included the lands in question.

XIII. That after the ratification of said contract by the legislature aforesaid the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company settled and adjusted the claim of the Dubuque and Sioux City Railroad Company to the land enuring to it under said grant by reason of the road by it constructed; that under said adjustment the land in question belonged to and was held by the Iowa Falls and Sioux City Railroad Company under the acts of Congress and of the legislature of the State of Iowa aforesaid.

XIV. That by said act of the legislature of the State of Iowa approved April 7, 1868, aforesaid the time was extended for the completion of said railroad to Sioux City, Iowa, until the first day of January, 1872, upon the terms and conditions in said act contained, and that plaintiff was required by said act to signify its acceptance of the said grant within thirty days from the passage thereof by the filing with the governor of the State of Iowa a written instrument signed by its president, and that within said thirty days plaintiff, by its president, filed with the governor its written acceptance of the grant under said act.

XV. That between the seventh day of April, 1868, and the month of March, 1871, the said Iowa Falls and Sioux City railroad was completed to Sioux City, and the plaintiff became entitled to a patent for all of the lands enuring to said company under the said grant, including the land in suit; that the length of the line of road so completed was 331½ miles.

XVI. That by the terms of said grant the railroad companies constructing said line of road upon completion thereof be-
8 came and were entitled to receive under the terms of said grant 1,272,960 acres of land; that there has been certified to the State of Iowa and by the State patented to the companies entitled to receive the same under the said grant within the six-mile limits 455,219.12 acres, and outside of the six and within the fifteen mile limits 699,521.86 acres, which are all of the lands certified to the State under the said grant, except the Des Moines river lands, which, though certified to the State, never passed under the said grant; that there is a deficiency of about 71,000 acres; which said amount is needed to make a full grant of six sections per mile for the constructed line of road.

XVII. That after the said Iowa Falls and Sioux City Railroad Company had earned the land in suit by reason of the construction of said railroad as aforesaid the State of Iowa, on the 5th day of July, 1871, patented the said land to the said railroad company

which said patent was filed for record and recorded in the recorder's office in Woodbury county, Iowa, on the 25th day of August, 1871.

That on June 9, 1871, said Iowa Falls and Sioux City Railroad Company conveyed by warranty deed the land in suit to C. C. Vail, who, on June 10, 1871, conveyed said land to John I. Blair; which said deeds were duly filed for record and recorded in the office of the recorder of Woodbury county, Ia., on the 25th day of August, 1871.

That on July 7, 1871, for a valuable consideration, John I. Blair sold and conveyed the land in suit to the Sioux City and Iowa Falls Town Lot and Land Company, the present owner thereof; which said deed was filed for record and recorded in the recorder's office of Woodbury county, Iowa, on August 7, 1871.

That soon after the land in suit was certified to the State of Iowa under the said grant of May 15, 1856, the Iowa Falls and Sioux City Railroad Company entered, by its agents and tenants, into the occupancy and possession of said land, and the said railroad company and those claiming through and under it have ever since occupied and have fenced, cultivated, and improved said land.

9 And your petitioner further avers that by its agents and tenants it has been in the peaceable, open, notorious, and adverse possession of said premises since 1871, and has fenced and cultivated a large portion of said land; that it has paid the taxes upon said land for each year since 1872 up to 1882.

That it has been in the peaceable, open, adverse, and notorious possession of said premises for more than ten years prior to the bringing of this suit, and that the statute of limitations have quieted and established petitioner's rights thereto.

That the certification of the land in suit to the State of Iowa as aforesaid on the 7th day of April, 1863, under the act of Congress of May 15, 1856, had the force and effect of a patent from the Government and passed the title thereto to the State of Iowa; that the said certificate remains in full force and effect, and the title and right of possession of said premises are in the plaintiff herein under the said conveyances from the State of Iowa as aforesaid; that ever since the 7th day of April, 1863, the legal title to said land in suit has been in the State of Iowa and its grantees and those claiming under and through it as aforesaid.

XVIII. And petitioner further avers that by reason of some mistake in law and fraudulent misrepresentation of fact made by the defendant Thomas L. Griffey, the character of which is unknown to your petitioner, on June 30, 1882, the said land in question was wrongfully and unlawfully patented to defendant Thomas L. Griffey by the officers of the Government; that at the time of the issuing of the said patent to said Griffey the title to said land was not in the Government; that for more than ten years the title to said land had been vested in plaintiff.

That the act of the officers of the Government in issuing the said patent was unauthorized, illegal, and void and passed no title to the said Griffey.

That the ownership of petitioner in said land has at all times been paramount and superior to that of defendant, and when the
10 right of those under and through whom petitioner claims title attached the defendant had no right, claim, or interest of any kind or nature in or to said land.

XIX. Petitioner further states that defendant Charles Chamberlain, as heir-at-law of George W. Chamberlain, claims an undivided one-half interest in said premises under a conveyance from defendant Thomas L. Griffey and made May 10, 1857, to George W. Chamberlain, now deceased, father of said Charles Chamberlain.

Petitioner avers that the said Griffey had no title or interest in the said premises at the time he transferred the same to George W. Chamberlain and has never acquired an interest therein, and that said Charles Chamberlain takes nothing under said conveyance; that defendant O. C. Tredway has or claims an interest in said premises under the said defendant, Griffey, adverse to the interest and right of petitioner, the exact nature of which plaintiff is unable to ascertain; but petitioner avers that he has no right therein as against petitioner.

XX. Petitioner further avers that for many years it has farmed and cultivated, by its agents and tenants, a large portion of said land in the north and east of the Floyd river; that in 1879 all that portion of said land lying east of said river, embracing about 120 acres, was fenced by a renter of petitioner and used as a pasture; that the same has since that time been and is now used for a pasture and a cultivated field by the tenant of the petitioner and those holding under him; that there is now from 25 to 30 acres of corn and potatoes growing upon said land; that fences were put up in good condition by the tenant of petitioner and those claiming under him in the spring of 1883.

XXI. That upon a part of said tract south and west of the Floyd river there are many families who have built houses and living upon said land by permission of petitioner, and who have fenced portions of said tract and are cultivating and living on the same.

That the defendants, disregarding the rights of petitioner and its tenants, have unlawfully and wrongfully by force and vio-
11 lence torn down a portion of its fences upon said premises, turned the stock of the tenants of petitioner out of the pasture of said land, and have fenced up portions of said land, and refuse to allow the tenants of your petitioner and those claiming under it to go upon and cultivate the crop growing thereon, and have caused a large amount of stock to be turned into the pasture upon said land, and, by force, violence, and threats of personal injury, are endeavoring to prevent petitioner, by its tenants, from occupying and enjoying the said premises and cultivating the same, and are threatening to drive off by force and violence those who are living upon and cultivating said premises; that, unless said defendants are restrained by the order of this court, the tenants of your petitioner will be driven from the said premises and the cultivated land thereon will grow up to weeds, to the great injury of said land, and the fences will be torn down and removed from said land and the

crops growing thereon will be destroyed, and great and irreparable injury will be done petitioner.

XXII. That the defendant O. C. Tredway is insolvent; that the defendant Charles Chamberlain has no property to the knowledge of petitioner from which a judgment for damages could be collected; that the acts complained of are repeated daily, and redress in any other manner than by injunction, if possible, would require the bringing of a great number of suits.

XXIII. Therefore your petitioner prays that it may be decreed to be the owner of and entitled to the possession of said land; that the title thereto may be established and quieted in petitioner; that the patent therefor issued to said Griffey may be decreed to be void and of no effect, and the said defendants adjudged to have no right, title, or interest in such premises; that the said defendants and each of them, their agents, attorneys, and all persons acting under or through them or any of them, be enjoined and restrained from removing or destroying any of the fences erected upon said premises except those built by defendants thereon, and from injuring or destroying the crops growing thereon, and from turning cattle
12 or stock of any kind into and pasturing the pasture fenced upon the said land, and from in any manner interfering with the petitioner, its tenants, and those occupying said land under said tenants in the free use and enjoyment of said premises, and from interfering with the agents and tenants of petitioner and those occupying said premises under the petitioner, its agents and tenants, and hindering them from entering upon and cultivating the crops growing thereon, and from using and occupying said premises, and that a writ of injunction issue therefor, and that upon the hearing of this case the said injunction be made perpetual, and for such other and further relief as to justice and equity appertain, and that defendant pay the cost of the suit.

(Petition duly verified.)

Exhibit "A" attached to petition is as follows:

This agreement, made January 7, 1868, between the Dubuque and Sioux City Railroad Company, a corporation organized under the laws of Iowa, party of the first part, and the Iowa Falls and Sioux City Railroad Company, a corporation organized under the laws of Iowa, party of the second part, witnesseth:

That the party of the first part, in consideration of one dollar and the covenants and agreements herein contained to be kept and performed by the parties hereto, hereby sell, assign, transfer, and convey to the party of the second part all and singular the following property, real and personal—that is to say, so much of the Dubuque and Sioux City railroad as remains to be constructed, including the franchise, right of way, depot grounds, grading, maps, profiles, and the *pro rata* of six sections per mile of the lands granted by Congress to aid in the construction of said road.

Also all town lots situated at any point west of Iowa Falls in which said party of the first part has a legal or equitable interest.

Also all construction material now on hand, designed or intended

for the construction of said road west of Iowa Falls; also all contracts for grading beyond Iowa Falls; also all contracts for
13 delivery of ties to be used beyond Iowa Falls made by the party of the first part with any person whomsoever:

Provided, however, that these presents shall not be construed to embrace the road or any part thereof or appurtenances in anywise appertaining to the same now constructed from Dubuque to Iowa Falls, on the east bank of the Iowa river, nor any town lots at or east of Iowa Falls, nor a *pro rata* of six sections of land per mile granted by act of Congress and General Assembly of the State of Iowa for and on account of the road now constructed from Dubuque to Iowa Falls as aforesaid; such *pro rata* to be retained and held by the party of the first part:

To have and to hold the foregoing-granted premises and property unto the party of the second part, their successors and assigns forever.

And the said party of the first part hereby covenants to warrant and defend all and singular the premises and property hereby conveyed against the lawful claims of all persons whomsoever claiming by, through, or under them, the said party of the first part, and that they will execute or cause to be executed such other and further conveyances as may be necessary to secure the rights hereby conveyed.

And said party of the first part further agrees to pay to the party of the second part a drawback of ten per cent. on the gross earnings of the road of the party of the first part, so far as such earnings may be derived from business destined to or coming from any and all points west of Iowa Falls and which pass over the whole or any part of the road to be constructed by the party of the second part; which payment shall be made monthly and shall continue for a period of twenty years from October 1, 1867.

In consideration of which the party of the second part agrees to assume and become liable for all contracts heretofore made by the party of the first part with various and sundry parties for the grading of the road between Iowa Falls and Fort Dodge and the delivery of ties for said extension and for the erection of bridges
14 between Iowa Falls and Fort Dodge; also all contracts for right of way between said points.

And the said party of the second part further agrees to pay to the party of the first part, within sixty days from the date of the passage of the act of Congress and the acts of the General Assembly of Iowa necessary to confirm the land grant to the parties hereto or one of them, all moneys actually expended by the party of the first part in grading and bridging beyond the present terminus of the completed road of the party of the first part; also all moneys expended for right of way, depot grounds, and town lots beyond Iowa Falls; also money expended on account of tie contracts; also to pay at same time all moneys which the said party of the first part may hereafter expend on account of any such contracts for extension beyond Iowa Falls, together with interest from the date of such expenditure to time of payment.

The said party of the second part further agrees to take immediate possession of said railroad and work and prosecute the same to completion as rapidly as possible and complete the road as may be required by acts of Congress and acts of the General Assembly of the State of Iowa, and said party of the second part further agrees to construct said road as a first-class railroad in accordance with the laws and in accordance with the terms and conditions of the lease between the party of the first part and the Illinois Central Railroad Company dated the 13th of September, 1867, and also agrees that said railroad, when constructed, shall be in all respects subject to the terms and conditions of said lease the same as though built by the said party of the first part.

It being the true intent and meaning of these presents that the said party of the second part shall, as to all rights and obligations of said lease, take the place of the party of the first part so far as the road to be constructed by the party of the second part is concerned, and that the line of road now constructed by the party of the first part and the line of road to be constructed hereafter by the party of the second part shall constitute and be operated as one continuous line of railroad.

It is further understood that these presents shall operate to transfer the interest of the party of the first part, in and to said lease, so far as the same applies to said line of road west of Iowa Falls.

And it is further understood and agreed that the Iowa Falls and Sioux City Railroad Company shall not be bound to extend the said railroad in any manner different from the way in which the Dubuque and Sioux City railroad is or shall be bound to extend it under its contract with the Illinois Central Railroad Company, and in accordance with the provisions of the General Assembly of Iowa and the acts of Congress of the United States now in force, or that may be hereafter enacted.

And it is further understood and agreed that the Illinois Central Railroad Company shall assent to and confirm the agreement so far as relates to the leasing and operating of the said railroad, and that the said railroad and the said Illinois Central Railroad Company shall keep the accounts necessary to ascertain the amount of the ten per cent. drawback, and that the said account shall be open to the inspection of the Iowa Falls and Sioux City Railroad Company; and if at any time after the completion of the said road or any section of twenty miles thereof the Dubuque and Sioux City Railroad Company be in default for sixty days in the payment of the said ten per cent. drawback, the said Illinois Central Railroad Company shall release the same and pay it over to the Iowa Falls and Sioux City Railroad Company; and it is further understood and agreed between the parties hereto that if legislation extending the time of said land grant be not obtained from the Congress of the United States and the General Assembly of Iowa under such restrictions as they may impose before the adjournment of said General Assembly of the next session, that this agreement shall be null and void. It is further understood and agreed that the party of the second part shall not be liable in damage for not building the said railroad or any

part thereof, but shall pay any expenditures incurred by the party of the first part, and any money that may be called upon to pay upon any contract as hereinabove referred to, with interest as herein-
before provided.

16 In witness whereof the parties hereto have caused their respective common seals, duly attested, and the signature of the respective presidents to be hereunto affixed the day and year first above written.

DUBUQUE AND SIOUX CITY
RAILROAD COMPANY,
By M. K. JESSUP, *President.*
IOWA FALLS AND SIOUX CITY
RAILROAD COMPANY,
By JOHN I. BLAIR, *President.*
Attest: JOSEPH HOOD,
Sec. I. F. & S. C. R. R. Co.

Sealed and delivered in presence of—
SAMUEL N. STRONG.
E. K. GOODWAY.

On June 29, 1883, an order was made on said petition by the judge of said district court for a temporary writ of injunction, on plaintiff giving a bond in the sum of $1,000, which was done, and on the same day a temporary writ of injunction was issued and served on defendants in said petition named.

On the 19th day of November, 1883, John M. Tredway and W. W. Curtis, Geo. Earle and Samuel S. Burdette, late doing business as land attorneys in the city of Washington, D. C., under name of Curtis, Earle & Burdette, filed in said court a

Petition to Intervene

in said suit, stating in substance as follows:

That they have not heretofore been made parties, but aver that they have an interest in common with the defendants Griffey and Chamberlain in the property in controversy adverse to the claim and title set up by plaintiff, and taking and deriving such interest through the title of defendant Griffey and his grantees, and Charles Chamberlain, claiming and entitled to an interest as the only heir-at-law of George W. Chamberlain; that the interest of said John
M. Tredway amounts to an undivided one-fourth interest or
17 part of the land in controversy, and the interest of said Curtis, Earle and Burdette, amounting to an undivided one-fourth of the land in controversy; that petitioners come now and present their petition asking to be allowed to intervene in said suit, and to be made defendants, and that they be allowed until first day of March term, 1884, of this court to file answer and their abstract of title to land in suit.

(Petition duly verified by O. C. Tredway, attorney for petitioners.)

On the 23d day of November, 1883, the defendants and intervenors filed a

Motion to Try Cause on Written Evidence.

Which motion was by the court sustained.

At the November term, 1883, of said court said petitioners were allowed to intervene and — made defendants, and defendants were also given time to file answer and cause was continued.

On the 20th day of February, 1884, the defendants herein, Thomas L. Griffey, Charles Chamberlain, O. C. Tredway, John M. Tredway, Curtis, Earle and Burdette, filed in said court their

Answer and Counter-claim

stating in substance as follows:

1. That they have no knowledge of the averment set forth in the first paragraph of plaintiff's bill and therefore deny that plaintiff is a corporation duly organized under the laws of Iowa and ask that they be furnished with a copy of the law under which said company was organized and with a copy of its charter showing its powers, duties, and rights.

2. They deny that plaintiff is entitled to the land described in 2d paragraph of plaintiff's bill or to the possession thereof and deny that plaintiff was ever at any time the owner of said land and entitled to the possession thereof.

18 3. They deny that they wrongfully claim the possession of said premises from plaintiff, or that they are asserting their right to possession of the same by force and violence; on the contrary, they aver that they hold the paramount legal right to said land and by virtue thereof are entitled to the quiet and undisputed possession of the same.

4. In answer to the 4th paragraph of plaintiff's bill defendants admit that the United States by act of Congress approved May 15, 1886, entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State," granted unto the said State for the purpose of aiding in the construction of railroads and, among others, a railroad from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road to be completed as soon as the main road is completed to that point, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads, but defendants aver that said law provides in case it shall appear that the United States have, when the lines or routes of said road are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-emption have attached as aforesaid, which lands

thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, shall be held by the State of Iowa for the uses and purposes aforesaid: Provided that the land to be so located shall in no case be further than fifteen miles from the lines of said roads and selected for and
19 account of each of said roads, and also provided that the other conditions of the said granting act were fully complied with. Defendants admit that the land in dispute is within the six-mile limits of the grant subsequently made by the State of Iowa to the Dubuque and Sioux City Railroad Company, but they aver that the said land was pre-empted by the defendant Thomas L. Griffey at and before the time the line of said road was definitely fixed, and consequently did not pass under the grant either to the State of Iowa or through the State to the said railroad company, but by the express terms of the granting act was reserved, excepted, and excluded from said grant, and thereby said State became entitled to other land within the indemnity limits in lieu of that thus pre-empted as aforesaid, subject, however, to all of the provisions and conditions of the granting act of May 15, 1856.

5. They admit that the General Assembly of Iowa, by its act of July 14, 1856, which took effect shortly thereafter, entitled "An act to accept the grant and carry into execution the trust conferred upon the said State by the aforesaid act of Congress of May 15, 1856, making a grant of lands to the said State in alternate sections to aid in the construction of certain railroads in said State," granted to the Dubuque and Pacific Railroad Company, a corporation organized and incorporated under the laws of Iowa, on the conditions therein contained, all the lands granted by the aforesaid act of Congress to said State to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river near Sioux City; but they deny that the particular land now in contest was included in the aforesaid grant from the United States to the State of Iowa or in the grant from the said State to the Dubuque and Pacific Railroad Company, the rights of pre-emption of the defendant Thomas L. Griffey having attached thereto prior to the definite location of the line or route of said railroad, and they aver that this pre-emption right excepted and excluded the said land from the aforesaid grants.

20 6. Defendants, answering the 6th paragraph of said bill, admit that the Dubuque and Pacific Railroad Company, after the passage of the aforesaid act of Congress, made a survey and location of a line of railroad and caused a map thereof to be filed, but they deny that said map was filed or that said line of road was surveyed, staked out, and definitely located along and upon the surface of land through Woodbury county and past the land in suit on July 5, 1856, or that upon this pretended survey and definite location of the line of said railroad on July 5, 1856, the right of the Dubuque and Pacific Railroad Company became absolute to select, have, and retain enough of the land within the fifteen-mile limits from said line to make out the full grant under the said act of Con-

gress; and defendants aver that the said pretended survey of the line aforesaid claimed to have been made on July 5, 1856, was made nine days before the passage and approval of the act of the General Assembly of Iowa of July 14, 1856, accepting the grant from the United States to the State of Iowa under act of Congress of May 15, 1856, and making the Dubuque and Pacific Railroad Company a beneficiary under the grant; that up to the time that the aforesaid act of the General Assembly of Iowa of July 14, 1856, took effect there was no railroad company or corporation in existence authorized by law or vested with power to survey, locate, or construct any railroad from Dubuque to a point on the Missouri river near Sioux City under the conditions and privileges of the grant from the United States to the State of Iowa under the act of Congress of May 15, 1856. They further aver that the said pretended work of survey claimed to have been made on July 5, 1856, by the said Dubuque and Pacific Railroad Company through Woodbury county, Iowa, and past the land in suit was made without authority of law, national, State, or corporate; that it was premature, null, void, and of no effect; that it furnished no notice whatever to settlers or the land office of the district where the disputed land is situated of the definite location of the line or route of said Dubuque and
21 Pacific railroad through Woodbury county, Iowa; that it precluded no rights of settlers or pre-emptors under the aforesaid act of Congress of May 15, 1856, or under the pre-emption laws of the United States.

And defendants further say that the said act of the General Assembly of Iowa of July 14, 1856, which designated the Dubuque and Pacific Railroad Company as a beneficiary under the act of Congress of May 15, 1856, appended certain conditions precedent to the grant of lands to said Dubuque and Pacific Railroad Company, which conditions precedent constituted prerequisites to be complied with and fully performed by said railroad company before it could claim or become entitled to any land within the aforesaid grant; that the said granting act of the General Assembly of Iowa of July 14, 1856, required the said Dubuque and Pacific Railroad Company to accept the provisions of said act by a written instrument under the seal of said corporation, with the signatures of the proper officers affixed, within ninety days after the passage and approval of said act, and to file such acceptance in the office of the secretary of state of Iowa for record; it further required the line or route of said railroad to be definitely fixed on or before the first day of April after the passage of said act, thereby implying that the line of route of said road had not been definitely fixed up to or at the time of the passage and approval of said act; it further required maps or plats showing such line or route of said road to be filed in the offices of the governor and secretary of state of Iowa, and further required the governor of said State, after affixing his official signature, to file such maps in the department having the control of the public lands in Washington, the object and purpose of these requirements being to fix the definite location, to the end that the Land Department might be able to determine the limits

of the aforesaid grant and to adjust the rights of the railroad company and the claims of those to whom the rights of pre-emptors had attached to lands within the granted limits, and also the rights of those to whom the United States had sold or otherwise dis-
22 posed of lands within the granted limits up to and at the time the line or route of said railroad was definitely fixed; and defendants aver that the aforesaid conditions precedent of the granting act of the General Assembly of Iowa of July 14, 1856, were never complied with or by those claiming title under it; or, if ever complied with by said company or its grantees, were not complied with until long after the pre-emption rights of defendant T. L. Griffey had attached to the land in dispute, which rights, having attached prior to the time the line or route of said Dubuque and Pacific railroad was definitely fixed, reserved, excepted, and excluded the said land in controversy from the operation of the aforesaid grant.

7. Defendants, answering the 7th paragraph of plaintiff's bill, admit that at the time of the location of the Dubuque & Pacific railroad a large amount of land in sections designated by odd numbers within six miles of said railroad has been sold or otherwise disposed of by the United States, or the rights of pre-emptors had attached to the same, and defendants aver that the land in suit was among the land within said limits to which the right of pre-emption had attached and exempted the land from said grant.

Defendants further say that, as they have no knowledge of the matters, they deny that after the location of the said road and in the year 1856 the governor of Iowa appointed B. Henn an agent as provided in the act of Congress of May 15, 1856, to select other lands from those undisposed of in sections designated by odd numbers between the six and fifteen mile limits mentioned in said act of Congress in lieu of those previously disposed of within the six-mile limit. They deny that said agent, in pursuance of said appointment and by authority of said act of Congress, selected all the vacant and unappropriated land in sections designated by odd numbers between the six and fifteen mile limits of said railroad, and deny that said selections were completed in the month of September, 1856. They deny that said land so said to have been selected, together with those within the six-mile limit, were
23 all required to make a full and complete grant of land as contemplated by said act of Congress. Defendant avers that if said agent was appointed by the governor of Iowa and made selections of land in the indemnity limits of the grant, in lieu of those that had been sold, pre-empted, or otherwise disposed of in the granted limits as aforesaid, he should have made selection of land in the indemnity limits, in lieu of the land in suit in the granted limits, as the said land at the time of the alleged appointment of said agent, as well as at the time he is alleged to have returned the lists of selections, in September, 1856, was covered by the pre-emption settlement, filing, and entry of defendant Griffey on said land in suit, as will fully appear by reference to the records for the year 1856 of the land office of the district in which said land is situated.

Defendants admit that the land in controversy was included in the lists certified to the State of Iowa on April 7, 1863, for the use of the aforesaid railroad company, but they aver that the said land was inadvertently included in said lists by mistake or error of both law and fact and in contravention of the granting act of Congress approved May 15, 1856; that said land was wrongfully and unlawfully certified to the State; that the said certification was and is null and void and of no effect and should be cancelled by the court; that it conveyed no right or title to said land in suit either to the State of Iowa or the railroad company, for the reason that the rights of pre-emption had attached to the same under the pre-emption filing, settlement, and entry of said defendant Griffey as aforesaid; that said Griffey, at the date of the aforesaid certificate to the State for the said land, on April 7, 1863, was entitled to a patent for said land.

8. Defendants deny that after the aforesaid selections as stated in 7th paragraph of plaintiff's bill, that lists of lands so selected were properly made out and immediately filed in the office of the Secretary of the Interior. They deny that the filing of said lists furnish any proof as to the time that the line or route of said railroad
24 through Woodbury county, Iowa, and past the land in controversy was definitely fixed or that said lists furnish any evidence of title of the said railroad company in and to the land in controversy; on the contrary, defendants say that had these lists been properly made by said agent they would have shown that other lands had been selected from the indemnity limits, in lieu of the land in controversy, and which at the time of making said selections was subject to the attached pre-emption rights of defendant Griffey to the land in suit, and would have guarded and protected the land department against the error of certifying said pre-empted land to the State of Iowa as aforesaid.

9. These defendants, in answer to the averments made in the 9th paragraph of plaintiff's bill, deny that in 1860 the Dubuque and Pacific Railroad Company conveyed to the Dubuque and Sioux City Railroad Company the railroad then constructed by the Dubuque and Pacific Railroad Company, together with its franchises and appurtenances and the lands granted by Congress to aid in the construction of said railroad, so far as the same remained undisposed of, and deny that said Dubuque and Sioux City Railroad Company, by reason of said conveyance, became entitled to said land granted by said act of Congress, and further deny that the land in suit was embraced within said pretended conveyance.

10. Defendants admit that the time for completing the railroad from Dubuque to a point on the Missouri river near Sioux City was extended to January 1, 1872, by act of Congress of March 2, 1868, but aver that said extension was granted subject to all the conditions of the original act of May 15, 1856, and in no way impaired the right of settlers under the pre-emption laws of the United States to lands within the granted limits, but pre-empted prior to the definite location of the railroad to be benefited by the grant.

11. Answering the 11th paragraph of the plaintiff's bill, defendants deny that plaintiff acquired any right in or to the land grant

made to the State of Iowa by act of Congress of May 15, 1856,
25 under and by virtue of any purchase from the Dubuque and Sioux City Railroad Company; deny that plaintiff acquired any right or title whatever to the land in suit by virtue of the written contract referred to in said 11th paragraph.

12. Defendants admit the passage of the act of April 7, 1868, by the General Assembly of Iowa as alleged in the 12th paragraph of plaintiff's bill, but deny that plaintiff obtained any right, title, or interest in and to the land in suit by virtue of said act or by virtue of the contract therein referred to.

13. Defendants have no knowledge as to the adjustment between the Iowa Falls and Sioux City Railroad Company and the Dubuque and Sioux City Railroad Company alluded to in the 13th paragraph of plaintiff's bill, and therefore neither deny or admit the same, but deny that under any adjustment of any sort or kind between said companies the plaintiff acquired any right or title to the land in controversy.

14. Defendants, being without knowledge as to the matters set forth in 14th paragraph of plaintiff's bill, neither admit nor deny the same, but insist that such matters as therein stated neither convey nor tend to convey to plaintiff any right or title to the land in controversy.

15. Defendants, in answer to 15th paragraph of plaintiff's bill, say they have no knowledge as to the time the Iowa Falls & Sioux City railroad was completed to Sioux City, and neither admit nor deny it was completed between April 7, 1868, and March, 1871, but deny that by virtue of said completion plaintiff became entitled to any interest in the land in controversy. Defendants, having no knowledge as to the length of the said railroad from Dubuque to Sioux City, neither admit nor deny that said railroad is 331½ miles in length.

16. Defendants deny all averments in the 16th paragraph of plaintiff's bill. They expressly deny that by the terms of said grant the railroad company constructing said line of road, upon the completion thereof, became entitled to 1,272,960 acres of land or to any specific number of acres, but aver that the grant of
26 lands in alternate sections to the State of Iowa to aid in the construction of said railroad under the act of Congress of May 15, 1856, is not a grant of quantity, but a grant by sections, within certain described granted limits, with the right to select other sections or part of sections within certain indemnity limits, in lieu of lands in the granted limits, which the United States may have sold or otherwise disposed of or to which the rights of pre-emption attached at the time the line of railroad to be benefited by the grant was definitely fixed.

Defendants say that, so far as they know, there is no such deficiency as plaintiff avers of about 71,000 acres under the grant from Congress to the State to aid in the construction of a railroad from Dubuque to Sioux City; but if there be a deficiency, and such deficiency be even greater than plaintiff alleges, it cannot impair the rights of *bona fide* settlers to lands within the limits of the grant to

which the right of pre-emption attached at or before the time the line of said railroad was definitely and lawfully fixed. Defendants deny that plaintiff has ever had any title whatever in or to the land in contest, and deny that plaintiff has now any title to said land, either legal or equitable, but aver that all its pretentions of title are fraudulent and void and without foundation and are put forth with a view of oppression and extortion.

17. In answer to the 17th paragraph of plaintiff's bill, defendants deny that the Iowa Falls & Sioux City Railroad Company, by reason of the construction of the aforesaid railroad from Dubuque to Sioux City, earned the land in controversy, and, as they have no knowledge of the subject, they deny that the State of Iowa on July 5, 1871, patented said land to said railroad company; but, conceding that said land was so patented, defendants aver it was wrongfully and unlawfully patented, in error and mistake of both law and fact and in derogation of the paramount right of defendant Griffey to said land; that said patent conveyed no proper right or title to said land, and it was and is absolutely null and void and was so known to be void by the railroad company when it took said
27 patent, and should be set aside.

That the subsequent conveyance of the land in suit from the Iowa Falls & Sioux City Railroad Company to Charles E. Vail and from said Vail to John I. Blair and from said Blair to plaintiff, if made as alleged in plaintiff's bill, were wrongfully and unlawfully made, were known to all parties thereto to be null and void, conveyed no title to the land in dispute, and should be set aside. Defendants deny that the Iowa Falls & Sioux City Railroad Company, soon after the land was certified to the State of Iowa under the grant of May 15, 1856, entered by its agents and tenants into the occupancy and possession of said land, or that said railroad company and those claiming through or under it have ever since occupied, fenced, cultivated, and improved it.

They deny that plaintiff, its agents and tenants, have been in the peaceable, open, notorious, and adverse possession of said land since 1871 and have fenced, farmed, and cultivated large portions thereof. They deny that plaintiff has been in the peaceable, open, adverse, and notorious possession of said land and premises for more than ten years prior to the beginning of this suit, or that the statute of limitations has quieted and established plaintiff's rights to said land; on the contrary, they say that the certification of said land to the State of Iowa, having been made in error and in violation of the provisions of the aforesaid act of Congress of May 15, 1856, conveyed no title to said land, and consequently that the title thereto remained intact in the United States up to June 30, 1882, when patent for the same rightfully issued to defendant Thomas L. Griffey, and that as against the United States there is no statute of limitations.

Defendants deny that certification of the land in suit to the State of Iowa April 7, 1863, under the act of Congress of May 15, 1856, had the force and effect of a patent from the General Government; the same, having issued in mistake or error of law and fact, passed no valid title thereto to the State of Iowa.

Deny that said certification remains in full force and effect,
28 and that the right of possession of said premises is in the plaintiff under said conveyance from the State of Iowa as aforesaid.

Deny that ever since April 7, 1863, the legal title to the land in suit has been in the State and its grantees and those claiming through or under the said State, but aver that all the rights of the State and its grantees to the land in dispute, under the said certification of April 7, 1863, have been virtually annulled by the patent from the United States to defendant Griffey, of date June 30, 1882, based upon pre-emption rights of said Griffey in and to said land. Defendants aver that if the legal title to said land passed to said State by virtue of said certificate of April 7, 1863, the said State held the same in trust for said Griffey, to whom it justly and equitably belonged, and not in trust for the Dubuque and Pacific Railroad Company, to whom it never belonged.

18. In answer to the 18th paragraph of plaintiff's bill, defendants deny that by reason of some mistake in law or fraudulent misrepresentation of facts made by the defendant Griffey the said tract of land was on June 30, 1882, wrongfully and unlawfully patented to said Griffey by the officers of the Government. They aver that at the time of issuing said patent to said Griffey and prior thereto valid title to said land was in the Government, the just and equitable title to the same being in said Griffey, and hence deny that for more than ten years the title thereto had been vested in plaintiff. They deny that the acts of the officers of the Government in issuing said patent *was* unauthorized, illegal, and void and passed no title to said Griffey. They deny that the ownership of plaintiff in said land has at all times been paramount and superior to that of defendants, and deny that when the right of those under whom plaintiff claims title attached the defendants had no right, claim, or interest of any kind or nature in or to said land.

19. In answer to the 19th paragraph of plaintiff's bill, defendant Charles Chamberlain admits that he is the child and only
29 heir-at-law of George W. Chamberlain, deceased; admits that defendant T. L. Griffey and wife on May 10, 1857, by their deed of that date, duly executed, conveyed to said George W. Chamberlain an undivided one-half interest in said land; that the said Griffey having made proof of his right to said land under the pre-emption laws, having paid the purchase-money therefor, and obtained from the land office the usual certificate showing that he had complied with all the pre-emption laws of the United States, became entitled to a patent to said land; that his right to this patent matured on or about September 5, 1856, and that he had a perfect right to make said conveyance to Geo. W. Chamberlain on the 10th day of the following May; that said conveyance gave unto said Geo. W. Chamberlain a good and sufficient title to an undivided half interest in said land; that the said Geo. W. Chamberlain, during his lifetime, agreed to convey unto the defendant O. C. Tredway and the defendants Curtis, Earle, and Burdette half his interest in said land—that is, an undivided one-eighth interest to said O. C. Tredway and

an undivided one-eighth to said Curtis, Earle, & Burdette for prosecuting his claim to said land.

Defendant Charles Chamberlain further says that he inherited his father's interest in said land subject to said aforesaid agreement and is bound in law to carry out the contract; he is advised that his title to said land is good and valid, notwithstanding the averments of plaintiff to the contrary.

And defendant O. C. Tredway, in answer to so much of said 19th paragraph as relates to him individually, says he became entitled to an undivided one-eighth interest in said land from Geo. W. Chamberlain as a contingent fee for his professional services; and said defendant further says he has sold his interest in said land for a valuable consideration to defendant John M. Tredway; that, notwithstanding the averments of plaintiff to the contrary, he contends that said John M. Tredway, claiming title under his assignment from said O. C. Tredway, has valid claim and title to the aforesaid interest in said land.

30 And the defendant Griffey, in answer to said 19th paragraph of plaintiff's bill, says that he made his pre-emption filing on said land in controversy on July 19, 1856, his settlement thereon having been made prior thereto; that he made the final proof and paid the purchase-money and expenses required under the pre-emption laws of the United States and established his pre-emption right to said land early in September, 1856; that on or about September 6, 1856, he received from the land office the usual certificates showing he had complied with all the requirements of the pre-emption laws, and he thereby became fully entitled to a patent for said land, the said certificate being held equivalent to a patent; that he repeatedly applied to the proper authorities for the patent, but was put off from time to time, until finally he understood the land had been certified to the State of Iowa under said act of Congress of May 15, 1856; that he protested against the certification of the land in controversy to said State and always contended that said certification was unlawful and erroneous; that the said land at the time he made his settlement and filing, as well as at the time he made his final proof, was open to settlement under the pre-emption laws of the United States, as the records of the General Land Office and of the local land office at Sioux City will fully show; that his settlement and filing on said land being prior to the definite location of the railroad from Dubuque to Sioux City, his title to said land was and is paramount and superior to the title of the State for the use of said railroad company under the provisions of said act of Congress of May 15, 1856; that, notwithstanding the aforesaid certification of said land to the State, he persistently refused to receive or take back the money he had paid to the Government; that he retained open, public, notorious, and adverse possession of said land and premises, though under constant apprehensions that proceedings would be instituted against him under the aforesaid certificate to the State to eject him from the property; that he applied repeatedly to Congress for re-

lief, but without success; that on April 21, 1876, the
31 United States Congress passed a general law entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department." Regarding this law as sufficient to meet the exigencies of his case and to confer upon the Land Department jurisdiction in the premises, he applied, through his attorneys, Curtis, Earle & Burdette, to the Commissioner of the General Land Office for a reinstatement of his pre-emption entry. This application was resisted by the Iowa Falls and Sioux City Railroad Company and its grantees, who then claimed title to said land, but was allowed by the Commissioner; whereupon an appeal was taken to the Secretary of the Interior, who, after argument and full investigation, affirmed the decision of the Commissioner, and on June 30, 1882, patent issued to defendant Griffey for said land, and thereby the title of said defendants to said land, under the pre-emption laws of the United States, was ratified, established, confirmed, and declared to be valid; and said defendant contends that his right and title to said land dates back to his pre-emption filing on July 19, 1856; that having the United States patent to said land and being in possession of said premises he has the prior and paramount title to said land, and that it is incumbent on plaintiff to show a better title before this defendant and his co-defendants can be lawfully ousted from the premises; and said defendant Griffey admits that on May 10, 1857, he and wife conveyed an undivided one-half interest in said land to one Geo. W. Chamberlain, who has since departed this life intestate, leaving the defendant Charles Chamberlain his only child and heir-at-law; and defendant admits that he employed O. C. Tredway, an attorney of Sioux City, and Curtis, Earle & Burdette, land attorneys at Washington, to prosecute his claim to said land, and agreed to convey to said Tredway, as a contingent fee for his professional services, an undivided one-eighth of his one-half interest in said land, and unto said Curtis, Earle & Burdette another undivided one-eighth
32 of his half interest in said land, which agreement he is willing to carry out; and defendants John M. Tredway and Curtis, Earle & Burdette hereby admit that the foregoing statement of T. L. Griffey and Charles Chamberlain are correct; and they further say that they petitioned this court and obtained an order for them to intervene and become party defendants herein, to the end that they might better protect their own rights and the rights of the codefendants to the land in controversy.

20. In answer to the 20th paragraph of plaintiff's bill, defendants deny that plaintiff has for many years, by its agents and tenants, farmed and cultivated a large portion of said land situated north and east of Floyd river; deny that in 1877 all that portion of said land east of the Floyd river, embracing 120 acres, was fenced by a renter of plaintiff and used as a pasture, and that since that time said land has been and is now used for a pasture and cultivated field by the tenants of plaintiff and those holding under him. They admit that there may have been twenty-five to thirty ares of corn

and potatoes growing upon said land at the time of filing plaintiff's bill, but they deny that said crops belonged to plaintiff, its agents, or tenants, and they further deny that fences were put up on said land in good condition by tenants of plaintiff and those claiming under him in spring of 1883.

21. In answer to the averments of the 21st paragraph of plaintiff's bill, defendants deny that there are many families who have built houses and fences upon that part of said land lying south and west of the Floyd river, and are living on the same by permission of the plaintiff; and defendants aver that said families are living upon the said land under lease from defendants, and are bound to pay the rent to said defendants for the use and occupation thereof; deny that said defendants, in disregard of the rights of plaintiff and its tenants, have unlawfully and wrongfully, by force and violence, tore down a portion of the fence on said premises and turned the stock of plaintiff's tenants out of the pasture on said land.

33 Defendants admit that since the patent for said land issued to defendant Griffey they have fenced up such portions of said land as are occupied and cultivated by their tenants, and that they have refused to permit plaintiff or any person or persons whomsoever claiming under said plaintiff to enter upon said land or any part thereof and cultivate crops. They admit that they have caused stock to be pastured on said land, as they have an undoubted right to do, but they deny that they are by force and violence and threats of personal injury endeavoring to prevent the plaintiff or plaintiff's tenants from occupying and enjoying said premises and cultivating the same, or that they are threatening to drive off by force and violence those who are living upon and cultivating said premises. They deny that unless they, the said defendants, are restrained by this court the tenants of plaintiff will be driven from the premises; that the cultivated land there will grow up to weeds, to the great injury of the land; that the fences will be torn down and removed; that the crops growing thereon will be destroyed, and that great and irreparable injury will be done the plaintiff.

Defendants deny that plaintiff or the tenants are in possession of said land or that they are entitled to the possession thereof; on the contrary, the said defendants aver that they are the lawful owners and occupants of said land; that they have the legal right of possession to said land, and by their agents and tenants have the actual possession of said lands; that the defendant Thomas L. Griffey and those claiming under him have been in the actual, open, notorious, and adverse possession of said land from the date of his settlement thereon under the pre-emption laws of the United States, from July 19, 1856, down to the present time, and that he and his codefendants claim title to said land by possession as well as by virtue of the pre-emption laws of the United States and by virtue of his patent for said land, duly executed and recorded in Woodbury county, Iowa.

34 Defendants say that, so far from injuring and destroying said property or any part thereof, as is alleged by plaintiff, they have since obtaining patent for said land made valuable im-

provements thereon and have in contemplation other improvements which will add greatly to the value of the premises; that they have enclosed large portions of said land by good and lawful fences; that they have paid all taxes that have accrued on said land since the date of the patent to said defendant, Griffey, and they propose to pay all other taxes, assessments, and public dues thereon as they become due and payable; and defendants aver that no irreparable injury has been done or is likely to be done to said land or to plaintiff by reason of the occupancy or possession of said land by defendants.

22. In answer to the 22d paragraph of plaintiff's bill, defendants admit that defendant Griffey is a non-resident of Iowa, and say said Curtis, Earle, and Burdette are non-residents of Iowa, but aver that Charles Chamberlain, J. M. and O. C. Tredway are residents of Woodbury county, Iowa, and have ample means to meet any judgment likely to be rendered against the defendants for damages in this case, and said defendant, O. C. Tredway, denies that he is insolvent.

23. And defendants, further answering, say they deny each and every allegation in plaintiff's bill contained, except such as are hereinbefore expressly admitted or otherwise answered.

24. Defendants say that the plaintiff ought not to have and maintain its action herein against these defendants, for they say that the pretended cause of action set forth in plaintiff's bill is barred by the statute of limitations, for defendants aver that more than ten years have intervened between the accruing of plaintiff's pretended cause of action and the bringing of this suit, and said plaintiff should not therefore be allowed to further prosecute this action.

25. Defendants further say that plaintiff is estopped and ought not to be permitted or allowed to claim or plead that plaintiff is the owner of and entitled to the possession of the land in controversy or any part thereof or any interest therein or that any of these defendants wrongfully withhold the possession of said premises from plaintiff, or that said premises were granted to the State or to its grantees or to the plaintiff under the act of Congress of May 15, 1856, or any of the matters pleaded by plaintiff in its bill, because these defendants say that on July 19, 1856, defendant Griffey settled upon said land as a pre-emption and thereafter duly perfected his right to said land as such pre-emptor and obtained his patent to said land from the United States under and by virtue of such pre-emption settlement and filing so made on July 19, 1856, and from the date of such settlement down to the present time, a period of twenty-one years, the said premises have at all times been in the actual possession of said Griffey and those claiming by, through, from, or under him, and that the statute of limitations has quieted and established the rights of said Griffey and those claiming under him in and to said land and every part thereof.

26. And all these matters and things these defendants are ready to verify, and by virtue thereof the said defendants pray the decree of this court whether plaintiff should be permitted, against the several acts, admissions, and facts aforesaid, to insist that it is the owner

of and entitled to the possession of said land or any part thereof as against defendants.

27. Defendants say that plaintiff should not be allowed to maintain its action herein, for they say that under and by virtue of said act of Congress of April 21, 1876, the rights and title of defendant Griffey and those claiming under him to said land and his right and the right of those claiming through and under him to the possession of the same and every part thereof has been ratified, established, confirmed, and declared to be valid, and a patent for the land, under date of June 30, 1882, has issued from the United States to the defendant Griffey, and conveys to him and through him, to and for those claiming under him, a good and legal title to said land.

36 28. And defendants, further answering by way of counter-claim in addition to the counter-claim hereinbefore made, say that the defendants, Thomas L. Griffey, Charles Chamberlain, John M. Tredway, William W. Curtis, George Earle, and Samuel S. Burdette, are the absolute owners in fee simple of the land in suit; that the defendant Griffey is entitled to an undivided one-fourth interest therein; that the defendant Charles Chamberlain is entitled to an undivided one-fourth interest therein; that the defendant John M. Tredway is entitled to another one-fourth, and said defendants Curtis, Earle, and Burdette are entitled to the remaining one-fourth interest in said land.

29. And defendants say that an abstract of title is hereto attached as Exhibit "A," and pray that it may be taken as a part of this their answer.

30. And defendants say that defendant Griffey and his codefendants claiming by, through, or under him are now and at the time of the commencement of this suit and long prior thereto were in the actual possession of said land, and aver that the pretended claim now made by plaintiff to said land is adverse to the rights of defendants, is unlawful, unjust, and ought not to be sustained.

31. Defendants say that plaintiff's claim is invalid and unlawful, and plaintiff is estopped from claiming any interest in said premises for the reasons and defences hereinbefore set forth in this answer, and for the further reason that plaintiff and those under whom it claims title never complied with the conditions and provisions of the granting act of May 15, 1856, from Congress, or with the terms and conditions of the act of General Assembly of Iowa of July 14, 1856.

Wherefore defendants pray that plaintiff's action be dismissed; that the certification of said land by the United States to the State on April 7, 1863, alleged to have been made under the act of Congress of May 15, 1856, be set aside and cancelled, or that it be decreed that the land in suit be held by said State in trust for defendant Griffey and those claiming under him; that the patent from

37 the State for said land to the Iowa Falls and Sioux City Railroad Company, of date July 5, 1871, be declared null and void; that the deeds of said land from the Iowa Falls and Sioux City Railroad Company to Charles E. Vail, dated June 9, 1871, and

from said Vail to John I. Blair, June 10, 1871, and from Blair to plaintiff, July 1, 1871, each and all be set aside and declared of no effect; that defendants' title, claim, and interest in and to said land and premises be allowed, confirmed, and established by decree of this court free and clear of any claim, lien, or interest of plaintiff, and that defendants may have such further or other relief as may be consonant to equity and good conscience.

(Answer duly verified by defendants.)

On the 25th day of March, 1884, plaintiff filed a

Motion

to require defendants to make a more specific statement of their cause of action as set out in their counter-claim, in this:

Let the defendants other than defendant Griffey state in the 25th paragraph of said answer from whom they obtained title to said land, and when they obtained it.

Let defendants attach to the 29th paragraph of said answer the abstract referred to therein.

Let said defendants aver and show in the 31st paragraph of said answer wherein the parties through whom the plaintiff claims title did not comply with the requirements of the act of Congress of May 15, 1856, and act of General Assembly of Iowa dated July 14, 1856; which motion was sustained, except that defendant- need not set out abstract of title.

On the 6th day of April, 1885, defendants amended their answer and counter-claim by alleging as follows:

1. That defendants say that they obtained their title to said land and interest therein under and through defendant Thomas Griffey *on* or about the month of January, 1870.

38 2. They amend the 31st paragraph by adding thereto at the close thereof the following: "as hereinbefore fully and specifically stated."

On the 24th day of October, 1885, the plaintiff filed a

Reply

to defendants' answer and counter-claim, in substance stating as follows:

1. Denies each and every allegation therein contained which are contrary to or inconsistent with the allegations in said petition.

2. Denies that the defendants are the lawful owners and occupiers of said land, and that they have the legal right to the possession thereof.

3. Denies that Thomas L. Griffey and those claiming under him have been in the actual possession of said premises from the date of the settlement of said Griffey therein, on July 19, 1856, down to the present time.

4. Denies that the statute of limitations has quieted the title to

said premises in said Griffey and those claiming under or through him.

5. Further replying, plaintiff denies that by virtue of said act of Congress of April 21, 1876, the right and title of Thomas L. Griffey and those claiming under him to said land and the possession thereof has been ratified, established, and confirmed and declared valid.

6. Plaintiff avers that the said act of Congress has no reference or application to the land in suit, for the title to said land and the right to the possession of the same had vested in plaintiff and its grantors years before the passage of said act of Congress; that the issuing of said patent for said land to the said Griffey under and by virtue of said act of Congress was unauthorized and illegal and the patent so issued void and conveyed no title to said Griffey.

7. That the title to said land was not in the United States at the time said patent was issued; that in 1857 the Commissioner of the General Land Office decided the said land passed under the said grant of May 15, 1856, and in 1863 certified said land to the State of Iowa for the benefit of railroad company taking said land under
39 said grant, which right and title has passed to the plaintiff herein, as in said petition alleged, and that plaintiff and its tenants and lessees have ever since said time been in the actual, open, notorious, and adverse possession of said premises, and since the said land was patented by the State of Iowa to the Iowa Falls and Sioux City Railroad Company, on July 5, 1871, have paid the taxes thereon continuously up to 1882, and cultivated, fenced, and improved the said land with the full knowledge of the defendants Griffey, Chamberlain and O. C. Tredway and J. M. Tredway at the time he acquired his pretended interest therein and ever since that time.

8. Denies that Thos. L. Griffey acquired any rights in said land by virtue of his pretended settlement thereon as a pre-emptor.

9. Denies that he perfected his rights thereto as such pre-emptor. Plaintiff avers the facts to be that at the time of the pretended settlement thereon, July 19, 1856, the said land was not subject to pre-emption; that the line of the railroad to aid in the construction of which the said land had been granted had been definitely located past the land in suit; that the said Griffey, with full knowledge that the said line of road had been so located within a few rods of said land, made the pretended settlement upon said land and application to enter the same under the pre-emption act; that the said pre-emption entry of the said Griffey was never approved by the officer of the General Land Office, but on July 5, 1857, the said entry was cancelled by the Commissioner of the General Land Office for the reason that the rights of the railroad company had attached to said land prior to the date of the said Griffey's settlement; that from the date of the cancellation of said entry the said Griffey had no right, title, or interest in the said land.

10. Plaintiff avers, upon information and belief, that the said pretended pre-emption of said Griffey was not made in good faith, but was made for speculation purposes; that he never cultivated or

improved the said land; that his pretended residence thereon
40 was only colorable; that soon after he made his pretended proof of settlement under the pre-emption act he abandoned said land and has never since lived upon, cultivated, or improved the same, and that his claim thereto is void in law and a fraud upon the plaintiff herein.

11. Plaintiff says that the defendants ought not to have and maintain the defense and action in their counter-claim set out, for that more than ten years have elapsed after the right of action accrued to the defendants before action brought thereon, and that the same are barred by the statute of limitations.

12. Plaintiff says that defendant Griffey and the defendants claiming through him ought not to be permitted to make the defense set out in said answer and ought not to maintain their action upon said counter-claim in said answer set out for the reason they have slept upon their rights—have been guilty of laches in asserting their claim to said land.

Plaintiff prays that defendants take nothing by their counter-claim, and plaintiffs have a decree as in the petition prayed.

(Reply duly verified.)

On November 17, 1885, a motion was filed by defendants to

Strike Plaintiff's Reply

from the files on following grounds:

1. That the same was filed without leave of court.
2. That the same was filed without notice to defendants.
3. That the same was filed out of time.

Which motion was overruled and defendant excepted.

The said cause came on for hearing, commencing at the October term, 1885, and the plaintiff, to sustain the issues, offered and introduced the following testimony:

41 *Plaintiff's Testimony.*

The act of Congress of May 15, 1856, making a grant of land to the State of Iowa, etc. (to which defendant- objected as incompetent, immaterial, and irrelevant, as the records will disclose that plaintiff has no title to land in suit acquired prior to the acquisition thereof by defendant-). Said act is marked Exhibit "1," and is as follows:

Be it enacted by the Senate and House of Representatives of — America in Congress assembled, That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river near the mouth of the Platte river; from the city of Davenport via Iowa City and Fort Des Moines to Council Bluffs; from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line railroad near Maquoketa; thence on said main line, running as near as practicable to the 42nd parallel across the said State to the Missouri river; from the city of Dubuque to a point on the Missouri river near Sioux City, with a

branch from the mouth of the Tete des Morts to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the lines and routes of said roads are definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-emption have attached as aforesaid, which lands (thus selected in lieu of those sold and
42 (to) which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the State of Iowa for the use and purpose aforesaid: Provided, that the land to be so located shall in no case be further than fifteen miles from the lines of said roads: Provided further, that the land hereby granted for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: And provided further, that any and all lands heretofore reserved to the United States, by any act of Congress or in other manner by competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and parts of sections of land which by such grant shall remain to the United States within six miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

SEC. 3. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

43 SEC. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in

the manner following—that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and included within a continuous length of twenty miles of each of said roads may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed; and if any of said roads are not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 5. And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such prices as Congress may by law direct: Provided, that until such price is fixed by law the Postmaster General shall have power to determine the same.

Approved May 15, 1856.

Plaintiff offers in evidence the act of the General Assembly of Iowa approved July 14, 1856 (to which defendants object as last above), as Exhibit "2," viz.:

"An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That the lands, rights, powers, and privileges granted in and conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate
44 sections, to aid in the construction of a railroad in said State,' approved May 15, 1855, be, and the same are hereby, accepted upon the terms, conditions, and restrictions contained in said act of Congress.

SEC. 2. That so much of the lands, interests, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Burlington, on the Mississippi river, to a point on the Missouri river near the mouth of the Platte river are hereby disposed of, granted, and conferred upon the Burlington and Missouri River Railroad Company, a body corporate, created, and existing under the laws of the State of Iowa.

SEC. 3. That so much of the lands, interests, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Davenport, via Iowa City and Fort Des Moines, to Council Bluffs are hereby disposed of, granted, and conferred to and upon

the Mississippi and Missouri Railroad Company, a body corporate, created, and existing under the laws of the State of Iowa.

SEC. 4. That so much of the lands, interests, rights, powers, and privileges as are or may be granted and conferred, in pursuance of said act of Congress aforesaid, to aid in the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line railroad, near Maquoketa; thence on said main line, running as near as practicable to the 42d parallel, across the said State to the Missouri river, are hereby disposed of, granted, and conferred to and upon the Iowa Central Air Line Railroad Company, a body corporate, created, and existing under the laws of the State of Iowa.

SEC. 5. That so much of the lands, interests, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river at
45 or near Sioux City, with a branch from the mouth of the Tete des Morts to the nearest point on the said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted, and conferred to and upon the Dubuque and Pacific Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

SEC. 6. The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next after the passage of this act, and maps or plats showing such lines or routes shall be filed in the office of the governor of the State of Iowa and also in the office of the secretary of the State of Iowa. It shall be the duty of the governor, after affixing his official signature, to file such map in the department having the control of the public lands in Washington, such location to be considered final only so far as to fix the limits and boundary in which said lands may be selected; and if it shall appear that the lands that have been donated by the act of Congress aforesaid for the construction of the several lines above indicated cannot be obtained within the limits and along any part of the lines aforesaid the governor shall from time to time appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensations of such agents and the costs, expenses, and charges attendant upon and occasioned by making such selections shall be fixed, regulated, paid, and borne by each of said railroad companies, respectively, upon and for its own line.

SEC. 7. The Iowa Central Air Line Railroad Company shall furnish, equip, and operate the branch of their railroad that will be constructed under the grant from Lyons City to the point of intersection with the main line of their road near Maquoketa, in the same manner with the line from the west and so completely as though the same was a continuation of said main line, and shall never give any preference to the main line of said road or any part thereof as defined in their articles of incorporation by busi-
46 ness arrangements, tariff of prices, or otherwise over the said branch of their railroad.

SEC. 8. The grants aforesaid are made to each of said companies, respectively, upon the express condition that in case either of said railroad companies shall fail to have completed and equipped 75 miles of the road within three years from the first day of December next, 30 miles in addition in each year thereafter for five years, and the remainder of their whole line of road within one year thereafter or on the first day of December, 1865, then and in that case it shall be competent for the State of Iowa to resume all rights conferred by this act on the company so failing, and to resume all rights to lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

SEC. 9. The roads aforesaid shall be constructed upon a guage with a width of four feet eight and one-half inches, and the iron used in the track shall be of approved quality and pattern, and the said roads shall be completed and furnished in a style and of a quality equal to the average of other first-class western roads; and when the roads or any of them authorized to be constructed by this act shall be intersected by the roads of any other railroad company now constructed or to be hereafter constructed it shall be the duty of such road or roads receiving the benefit of this act to furnish all proper and reasonable facilities and to join such other company in making all necessary crossings, turnouts, sidelings, and switches, and other conveniences necessary for the transportation of all freight and passengers over either or any road or roads hereby mutually accommodated, whether said passengers or freight are brought by the roads benefited by this act or any other road or roads now constructed or which may hereafter be constructed, and at such rates as shall not in any case exceed the regular tariff or charges on said road or roads.

SEC. 10. All persons who at the time said grant was made had valid claims by actual occupation and improvement upon any of the land embraced in said grant shall be protected in the
47 same and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

SEC. 11. Any person wishing to avail himself of the provisions of this act shall, within three months after the passage thereof, file his application for that purpose with the judge of the county where such lands may be situate, and shall prove, to the satisfaction of said judge, that his claim is valid, and that the same existed at the time said grant was made; and, upon such proof being made, such judge shall give to the applicant a certificate of the fact, and such certificate shall entitle the holder or *bona fide* assignee to enter such land at the rate of $2.50 per acre: Provided, that no person, claimant, or the assignee of a claim shall be entitled to more than one hundred and sixty acres of land under this grant; and provided further, that the person asserting a claim, whether a claimant or assignee, shall file his affidavit that he has not, either directly or indirectly, received the benefit of the provisions of this act. Before any rights shall be acquired under such certificate a copy of the same, together with the evidence, shall be served upon the secretary

of the company interested, and such company shall have the right to appeal from the decision of such judge to the district court in the same manner as appeals are taken from the decisions of justices of the peace at any time within ninety days after the service of such papers, and the same shall be tried as other appeal cases, and an appeal may be taken to the supreme court by either party in the same manner as appeals in other cases.

SEC. 12. Such certificate, on being filed with the secretary of the company on whose line of road such lands may be situate, when no appeal has been taken as herein provided, shall entitle the holder or his assignee to the possession of said land until the title shall become vested in the company. Upon payment thereafter to the treasurer of the company for said land at the price above designated, such person shall receive from the secretary of said company a patent to such land, not exceeding in quantity 160 acres.
48 Such deed or patent shall vest in the purchaser all the title of said company in and to such lands, except so far as to reserve to the company all such right-of-way and station grounds as may be actually necessary for the uses of the company.

SEC. 13. The said companies shall each severally assent to and accept the provisions of this act, by a written instrument, under the seal of such corporation, with the signature of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the secretary of state and be by the secretary recorded in the books kept by him for the recording of articles of association.

SEC. 14. Said railroad companies accepting the provisions of this act shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the General Assembly of Iowa not inconsistent with the provisions of this act and the act of Congress making the grant.

SEC. 15. It shall be the duty of the companies receiving the benefit of this act to make a regular annual report of their proceedings, at the usual time and place of electing their officers, exhibiting a detailed statement, as far as practicable, of the amount of their expenditures, liabilities, etc., a copy of which shall be filed in the office of the secretary of state.

SEC. 16. Be it further enacted, That any of said companies accepting the grant of lands under this act shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever upon the State of Iowa for a misapplication of said grant, incumbrances, or conditions in this act imposed.

SEC. 17. This act shall take effect and be in force from and after its publication in the Iowa Capital Reporter and Iowa City Republican.

Approved July 14, 1856."

"I certify that the foregoing was published in the Iowa Capital Reporter and Iowa City Republican on the 16th day of July, 1856.

GEO. W. M'CLEARY,
Secretary of State."

49 And plaintiff introduced in evidence as Exhibit "3" the act of Congress approved June 2, 1864 (to which defendants object as last above), viz:

"An act to amend an act entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Mississippi and Missouri Railroad Company, a corporation established by the laws of the State of Iowa and to which the said State granted a portion of the land grant mentioned in the title of this act to aid in the construction of a railroad from Davenport to Council Bluffs, in said State, may modify or change the location of the uncompleted portion of its line as shown by the map thereof now on file in the General Land Office of the United States so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific railroad: Provided, nevertheless, that said new line, if located, shall in every case pass through the corporate limits of the cities of Des Moines and Council Bluffs; and the right of way over the public lands of the United States is hereby granted to said railroad company for that purpose: Provided, that said line shall pass through the town of Newton, in Jasper county, or as near said town as may be found practicable, and not further north of said town than the north line of section 22, town. 80 north of range 19, according to United States survey, if the citizens of the county of Jasper shall first pay to said company the difference in cost, if any, between the line proposed by the company and the one contemplated by this proviso, including extra cost of right of way, if any, said difference in cost to be estimated by competent engineers to be selected by the parties.

SEC. 2. And be it further enacted, That whenever such new location shall have been established the said railroad company
50 shall file in the General Land Office at Washington a map definitely showing such new location, and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of or to which a pre-emption claim or right of homestead settlement has not attached and on which a *bona fide* settlement and improvement has not been made under color of title from the United States or from the State of Iowa, within six miles of such newly located line, an[d] amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from said line, then such selections may be made along such line within twenty miles thereof: Provided, that the said company shall not be entitled to and shall not receive any land upon this grant which is situate within fifteen miles of the line of the Burlington and Mis-

souri River railroad as indicated by the map of said road now *now* on file in the General Land Office.

SEC. 3. And be it further enacted, That the Burlington and Missouri River Railroad Company, a corporation organized under the laws of the State of Iowa and to which said State granted a portion of the land grant mentioned in the title of this act to aid in the construction of a railroad from Burlington, in said State, to the Missouri river, shall be entitled to receive and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of or to which a pre-emption claim or right of homestead settlement has not attached or on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within six miles of said road as now located, an amount of land per mile equal to
51 that mentioned in the act to which this act is an amendment as intended to aid in the construction of said road; and if the amount of land granted by the original act to aid in the construction of said road shall not be found within the limit of six miles from the line of said road, then such selections may be made along such line within twenty miles thereof.

SEC. 4. And be it further enacted, That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said State granted a portion of the land mentioned in the title of this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the General Land Office of the United States, so as to secure a better and more expeditious line to the Missouri river and to a connection with the Iowa branch of the Union Pacific railroad; and for the purpose of facilitating the more immediate construction of a line of railroad across the State of Iowa to connect with the Iowa branch of the Union Pacific Railroad Company aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled for such modified line to the same lands and to the same amount of lands per mile as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the same purpose, right of way through the public lands of the United States is hereby granted to said company; and it is further provided that whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said com-
52 pany, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United

States not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment; and if the amount of land per mile granted or intended to be granted by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selection may be made along such modified line and connecting branch within twenty miles thereof: Provided, however, that such new located or modified line shall pass through or near Boonesboro', in Boone county, and intersect the Boyer river not further south than a point at or near Dennison, in Crawford county; and provided, further, that in case the main line shall be so changed or modified as not to reach the Missouri river at or near the 42d parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri river, to construct a branch road to some point in Monona county, in or at Onawa city, and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner, said lands to be selected from any of the unappropriated lands, as hereinbefore described, within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the said branch; and provided, further, that the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the governor of the State of Iowa shall certify to the Secretary of the Interior that the
53 said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one-third, and no more, of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said Secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the Secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: Provided, however, that no lands shall be conveyed to said company on account of said connecting branch road until the governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad; and no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri railroad, as laid

down on a map on file in the General Land Office: Provided, further, that it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant de-cribed in this section sufficient, in the opinion of the governor of Iowa, to secure the construction of a branch road from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton, in said State, until the governor of said State shall certify that said branch railroad is completed according to the requirements of the laws of said State: Provided further, that nothing herein contained shall be so construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: Provided further, that nothing in this act shall be construed to interfere with or in any manner impair any rights acquired by any railroad company named in the act to which this is
54 an amendment or the rights of any corporation, person, or persons acquired through any such company, nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: Provided, however, that no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a *bona fide* inhabitant under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment; but each of said companies may select an equal quantity of public lands, as described in this act, within the distance of twenty miles of the line of each of said roads, in lieu of lands thus settled upon and improved by *bona fide* inhabitants in good faith, under color of title as aforesaid.

SEC. 5. And be it further enacted, That the Mississippi and Missouri Railroad Company shall have the right to transfer and assign all or any part of the grant hereby made to said company to any other company or person or persons if, in the opinion of said company, the construction of said railroad across the State of Iowa will be thereby sooner and more satisfactorily completed; but such assignee shall not in any case be released from the liabilities and conditions accompanying this grant nor acquire perfect title in any other manner than the same would have been acquired by the grantee herein named: Provided, that said transfer and assignment shall first be authorized by the governor of the State of Iowa.

SEC. 6. And be it further enacted, That the Dubuque and Sioux City Railroad Company may so far change their line between Fort Dodge and Sioux City as to secure the best route between those points; said change shall not impair the right to nor change the location of their present land grant. A map of the change shall be filed with the Commissioner of the General Land Office within one year after the passage of this act.

SEC. 7. And be it further enacted, That all the conditions
55 and limitations contained in the act to which this is an amendment, and not expressly changed by this act, shall

attach to and run with the grants made by this act, except as the said conditions and limitations have been modified and may hereafter be modified by the General Assembly of the State of Iowa.

SEC. 8. And be it further enacted, That no lands hereby granted shall be certified to either of said companies until the governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa to aid in the completion of such railroad.

SEC. 9. And be it further enacted, That all lands hereafter certified to either of the land-grant railroads in said State, and lying opposite any completed section of such road, shall be offered for sale by the company to which they shall be certified within three years from the completion of such section, if then certified; and if not, then within three years from the date of such certificate, at reasonable prices; and if not all sold within that period, then during the fourth year all such lands remaining unsold shall be exposed for sale, after previous notice, posted at the county-seat of the county in which such lands shall be situated, to the highest bidder, and in tracts not exceeding one hundred and sixty acres each."

Approved June 2, 1864.

Plaintiff offers in evidence as Exhibit "4" the act of the
56 General Assembly of Iowa, approved April 7, 1868 (to which defendants object as last above), viz:

"An act to legalize, confirm, and carry out a contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company, and to extend the time for completing said railroad from Dubuque to Sioux City, to grant certain lands to the Dubuque, Bellevue and Sabula Railroad Company for the building of the Tete des Morts branch, and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That a contract entered into between the Dubuque and Sioux City Railroad Company, of the first part, and the Iowa Falls and Sioux City Railroad Company, of the second part, transferring so much of the Dubuque and Sioux City railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurten-ces of said road to be completed; also transferring all right and title of the said Dubuque and Sioux City Railroad Company to so much of the lands granted by Congress to aid in the

construction of said road as shall appertain to or be legally applicable to the construction of the uncompleted part of the Dubuque and Sioux City Railroad Company as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue and Sabula Railroad Company, be, and is hereby, legalized and confirmed.

SEC. 2. That the *pro rata* of six sections of land per mile reserved by said contract to the Dubuque and Sioux City Railroad Company and the *pro rata* of six sections per mile conveyed by said contract to said Iowa Falls and Sioux City Railroad Company shall be adjusted between said companies as follows, to wit: The land actually conveyed to third parties shall be set apart to said Dubuque and Sioux City Company, not exceeding six sections per mile for the road now built, and if over that number of acres of land have been conveyed, the excess over that amount shall be taken off the west end of the last installment of the lands so conveyed; and in
57 case less than the amount of lands have been conveyed as aforesaid, then a sufficient amount shall be taken to make up such *pro rata* from that portion of the land grant next adjoining and immediately west, as near as practicable, to the lands last conveyed by said Dubuque and Sioux City Railroad Company.

SEC. 3. That a *pro rata* of six sections per mile of said land grant be, and the same is hereby, granted to and conferred upon the Dubuque, Bellevue and Sabula Railroad Company to aid in the construction of said road, known as the Tete des Morts branch, required to be built by the act of Congress granting said lands to the State of Iowa: Provided, that said company shall not encumber or dispose of said lands until the said branch road shall be completed and opened for business, and that said branch shall be completed within two years from the first day of January next. Said lands shall be of an average quality and value of so much of said lands granted to — by the United States as now remain undisposed of, and the governor of Iowa shall select or caused to be selected the land hereby granted to said Dubuque, Bellevue and Sabula Railroad Company or cause the same to be reserved from lands outside of the six-mile limits of said grant, and upon completion of said branch as above provided he shall execute a patent for said lands to said company.

SEC. 4. That so much of said land grant as is applicable to the uncompleted portion of the road, as aforesaid, west of Iowa Falls, excepting the lands hereby granted to said Dubuque, Bellevue and Sabula Railroad Company, is hereby granted to and conferred upon the said Iowa Falls and Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting said lands, dated the 15th day of May, A. D. 1856, and the act amendatory thereto and the act of Congress passed the present session, and also subject to the terms and conditions of this act, as herein expressed, as follows, to wit: The road shall be completed as a first-class road from Iowa Falls, on the route now surveyed, located, and
58 partly graded, through Webster City and Fort Dodge, and the depot buildings shall be erected on the grounds heretofore donated by the people of said towns for that purpose, and shall be completed thence to Sioux City, which route shall be at all points

within the limits of the said land grant. The track of said road shall be laid with a good, substantial rail weighing not less than fifty-six pounds per lineal yard. The road shall be completed to Fort Dodge by the first day of July, 1869, the time now fixed by act of Congress; one-half of the balance within one year from that time, and the remainder before the first day of January, A. D. 1872; and said road, when any twenty miles shall be completed, shall be subject to the lease of the Illinois Central Railroad Company transferred to the Iowa Falls and Sioux City by the Dubuque and Sioux City Railroad Company, and shall be operated as one continuous and unbroken through line of railroad from Dubuque to Sioux City.

SEC. 5. Said lands so granted as aforesaid to the Iowa Falls and Sioux City Railroad Company shall be patented by the governor to said company as the same shall be earned by the building of said road, but no patent shall be issued by him for any portion of said lands until at least seventy-five miles of road shall be completed, and 'no patent shall be made for any lands more than forty miles in advance of the point to which said road may be constructed from time to time,' as provided by said act of Congress. No patent shall be made for any lands located within fifty miles of Sioux City until said company shall have its entire road completed to Sioux City, except for such road as said company may cause to be built and operated from Sioux City eastward, and when said company shall have forty miles of road built and operated from Sioux City eastward, then this restriction shall cease, and such land may be patented for any road built by said company, and no patent shall include lands situate in more than one county, and such patent shall be by said company recorded in the county where said lands lie, and a certified copy of the record of the same may be used as evidence with the same effect as the original; and in case any of said lands hereby granted are now and were on the first day of January last occupied by actual settlers residing thereon and improving the same, upon such settler making proof to the satisfaction of the register of the State land office of such settlement and improvement he shall be entitled to purchase not exceeding one quarter section of land of the State at the rate of $2.50 per acre, and when such land shall have been earned by the extension of said road, upon the payment to the said company of the said sum, the governor shall execute a patent to such actual settler for the said land.

59

SEC. 6. The legislature shall have the power to resume the lands not earned at the time of such resumption on default of said company to build said road to Fort Dodge by the first day of July, 1869, or any portion of the road within the time limited herein, or in case they shall be satisfied that said company is not pushing forward on said road with reasonable diligence, so as to warrant the belief that the whole line will be completed to Sioux City by the first day of January, 1872.

SEC. 7. The said Iowa Falls and Sioux City Railroad Company shall signify their acceptance of the terms and conditions of this act by a written instrument signed by the president of said com-

pany, to be filed with the governor within thirty days after the passage of this act. The company accepting the provisions of this act shall, at all times, be subject to such rules, regulations, and rates of tariff for the transportation of freight and passengers as may from time to time be enacted by the General Assembly of the State of Iowa. If the said Iowa Falls and Sioux City Railroad Company shall fail or refuse to accept of this grant upon the conditions hereby imposed and in the time and manner as herein required, the census board of this State is hereby authorized, by proper writing, with the seal of the State affixed thereto, to confer the same upon such party or company as shall, in their judgment, be competent to carry the enterprise hereinbefore provided for in good faith, and which shall accept the grant by a proper written instrument duly executed and attested, and shall file the same in the office of the secretary of state, subject to all the sections of this act, and the same shall be applicable to such grantee, subject to the terms and conditions of this act, as fully as if named originally herein.

SEC. 8. Nothing in this act contained shall be construed to affect in any way the titles, rights, or interests of persons or corporations not expressly named in this act.

SEC. 9. This act, being deemed of immediate importance, shall take effect from and after its publication in the Daily Iowa State Register and Daily Evening Statesman, newspapers published in Des Moines, Iowa.

Approved April 7, 1868."

"I hereby certify that the foregoing act was published in the Daily State Register April 22, 1868, and in the Iowa Evening Statesman April 22, 1868.

"ED. WRIGHT,
"*Secretary of State.*"

Plaintiff offers in evidence duly certified copies of orders received from Thomas A. Hendricks to register and receiver at Dubuque, Sioux City, Chariton, Des Moines, and Council Bluffs, dated May 10, 1856, attached to transcript as Exhibit "5" (to which defendants object as last above), each of which are as follows:

"GENERAL LAND OFFICE, *May* 10, 1856.

"Register or receiver:

"You will suspend from sale or location all the lands in your district until further orders. Acknowledge the receipt of this dispatch by telegraph and mail.

"THOMAS A. HENDRICKS,
"*Commissioner.*"

(Received at Sioux City March 26, 1856.)

Plaintiff offers in evidence duly certified copies of dispatch from Commissioner Hendricks to register and receiver at Sioux City, dated May 10, 1856, with certificate of J. A. Williamson, Commissioner, dated May 31, 1877, to Exhibit- 5 and 6, attached to transcript as Exhibit "6," viz:

61 "Register and receiver, Sioux City, Iowa:

"You will suspend from sale or location all the lands in your district situated south of the line which divides townships 91 and 92 until further orders. Acknowledge receipt of this dispatch by telegraph and mail.

"THOS. A. HENDRICKS,
"*Commissioner.*"

(Received at Sioux City May 26, 1856; to which defendants object as last above.)

Plaintiff offers in evidence as Exhibit "7" attached to transcript certified copy of letter from Thomas A. Hendricks, Commissioner, to register and receiver at Sioux City, Iowa, dated May 15, 1856:

"GENERAL LAND OFFICE, *May* 15, 1856.

"Register and receiver, Sioux City, Iowa.

"GENTLEMEN: By my telegraphic dispatch of the 10th inst. you were directed to suspend from sale or location all the lands in your district situated south of the line dividing townships 91 and 92 until further orders. The object of this withdrawal was to protect from sale the lands granted to the State of Iowa for four railroads running from the Mississippi to the Missouri river by a bill which has just passed both houses of Congress.

"Said bill, having this day been approved by the President, has become a law, and you will continue to withhold the lands from sale or location until otherwise directed.

"It is designed to adjust the several grants with as little delay as practicable, in order that the lands remaining to the United States may be restored to market.

"THOS. A. HENDRICKS,
"*Commissioner.*"

(Received at Sioux City June 8, 1856) (to which defendants object as last above).

Exhibit "8," introduced by plaintiffs, is the certificate with this preceding exhibit and Exhibit No. "9," by J. A. Williamson, Commissioner General Land Office, filed May 31, 1879, viz:

62 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *May* 31, 1877.

"I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed, on pages 1 and 2, is a true and literal exemplification of the record of this office, being a letter from the Commissioner of the General Land Office, dated May 15, 1856, to the register and receiver at Sioux City, Iowa, relating to the withdrawal of certain lands.

"In witness whereof I have hereunto subscribed my name and caused the seal of the office to be affixed, at Washington, the day and year above written.

"[SEAL.] J. A. WILLIAMSON,
"*Commissioner General Land Office.*"

(To which defendants object as last above.)

Plaintiff offers in evidence, as Exhibit No. "9," certified copy of letter of May 15, 1856, of Thomas A. Hendricks, Commissioner, to register and receiver of land office at Sioux City, together with certificate of J. A Williamson, Commissioner, dated May 31, 1877, viz:

"GENERAL LAND OFFICE, *May* 15, 1856.

"Register and receiver, Sioux City, Iowa.

"GENTLEMEN: By my telegraphic dispatch of the 10th inst. you were directed to suspend from sale or location all the lands in your district situated south of the line dividing townships 91 and 92 until further orders. The object of this withdrawal was to protect from sale the lands granted to the State of Iowa for four railroads running from the Mississippi to the Missouri river by a bill which has just passed both houses of Congress. Said bill, having this day been approved by the President, has become a law, and you will continue to withhold the lands from sale or location until otherwise directed. It is designed to adjust the several grants with as little delay as practicable, in order that the lands remaining to the United States may be restored to market.

"I am, very respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Received at Sioux City June 8, 1856.)

63 The certificate attached to which is by J. A. Williamson, Commissioner General Land Office, dated May 31, 1877, duly certifying under his hand and seal that it is a true and perfect copy of the records of his office.

(To all of which defendants objected as last above.)

Plaintiff offers and introduces in evidence as Exhibit "10" a duly certified copy of a letter from Bernhart Henn, agent for the selection of lands, to Thomas A. Hendricks, Commissioner General Land Office, dated September 4, 1856, together with the certificate thereto attached of J. A. Williamson, Commissioner of General Land Office, dated May 31, 1877, duly certifying the same, under his hand and seal of office, to be a true copy of the records in his office, which letter is as follows:

"CHICAGO, ILL., *Sept.* 4, 1856.

"SIR: For and in behalf of the State of Iowa and the four several railroad companies which, by the act of the Legislative Assembly of the said State of Iowa, July 14, 1856, were constituted the beneficiaries of the grants of land made to said State by the act of Congress approved May 15, 1856, and as the legally appointed agent of said State and of said companies, I hereby select the unsold land in the sections and parts of sections, designated by odd numbers, between the six and fifteen mile limits on each of the roads, to make up the deficiency caused in the odd-numbered sections within the

six-mile limits by sales or valid pre-emption rights existing prior to the grants made to said State by said act of Congress.

"Very respectfully, your obedient servant,

"BERNHART HENN, *Agent, &c.*"

(Objected to by the defendant as incompetent, immaterial, and irrelevant, and that it constitutes no selection of lands.)

Plaintiff offers in evidence as Exhibit "11" a certified copy of letter from Commissioner of General Land Office to Bernhart Henn, agent, dated January 19, 1857, and duly certified to by J. A. Williamson, Commissioner, dated October 11, 1877, viz:

64 GENERAL LAND OFFICE, *Jan.* 19, 1857.

"Hon. B. Henn, agent of the State of Iowa and the Iowa railroad companies, present.

"SIR: I have carefully examined and considered your communication of the 14th inst., on behalf of the Iowa railroad companies, and am unable to agree with you in the conclusion at which you have arrived

"The grant is to the State of Iowa. It is to aid in the construction of railroads within her limits. That the grant would fall under the control of corporations created by the State of Iowa must have been anticipated by Congress. * * * *

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Objected to by defendants as incompetent, immaterial, and irrelevant and not certified.)

Plaintiff offers in evidence a certified copy of a map showing the location of the line of railroad from Dubuque, Iowa, to a point on the Missouri river at Sioux City, with the certificates attached thereto —certificates of president and engineer of the road—dated the 27th day of September, 1856, and also certificates of Willis Drummond, Commissioner of General Land Office and governor of Iowa, attached to transcript as Exhibit "12" and made a part hereof and referred to, but owing to its nature and extent cannot be set out in this abstract, but is attached to transcript as Exhibit "12;" to which defendants object as incompetent, immaterial, and irrelevant, and that the certificate of the United States Land Office only certifies that this shows the line of that road, and it is not competent to certify to the correctness of the certificates purporting to be from the company and from the State.

Plaintiff offers in evidence as Exhibit "13," attached to transcript, duly certified copy of a letter from Commissioner of General Land Office to register and receiver of land offices at Dubuque, Sioux City, &c., dated Jan. 28, 1858, with certificate of J. A. Williamson, Commissioner of General Land Office, dated June 25, 1877, attached thereto, certifiing same under his hand and seal of
65 office to be a true copy from the record of his office, which letter is as follows, viz:

"GENERAL LAND OFFICE, *Jan.* 28, 1858.

"Register and receiver land office, Dubuque, Chariton, Fort Des Moines, Council Bluffs, Sioux City, and Fort Dodge.

"GENTLEMEN: For your guidance in disposing of the public lands I have this day transmitted you by mail a diagram of the district of lands subject to sale at your office, upon which has been traced the lines of route and the lines of the six and fifteen mile limits within the said district of the railroad, to aid in the construction of which a grant of lands was made to the State of Iowa by an act of Congress approved May 15, 1856.

"As all the vacant tracts in the odd-numbered sections outside of the six and within the fifteen mile limits have been selected by the agent of the State in lieu of the lands sold and pre-empted in the alternate sections granted by the act above mentioned, such tracts are not restored to market by notice No. 591, copy herewith, and you will, of course, continue to reserve them, as heretofore, from sale or location for any purpose whatever.

"Respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Diagram received at Sioux City Feb. 14, 1858.)

(To which defendants object as incompetent, immaterial, and irrelevant.)

Plaintiff offers in evidence as Exhibit "14" certified copy of letter of Commissioner General Land Office to B. Henn, dated November 24, 1858, and attached to transcript, together with certificate of J. A. Williamson, Commissioner General Land Office, dated October 11, 1877, certifying under his hand and seal of office, which letter is as follows:

"GENERAL LAND OFFICE, *Nov.* 24, 1858.

"Bernhart Henn, agent of the State, etc., Fairfield, Ia.

"SIR: Pursuant to the request of W. T. Steiger, I have to 66 state that the certificate by the governor of the State of Iowa of the construction of forty miles west from the city of Dubuque of the Dubuque and Pacific railroad, accompanied by a map exhibiting the same, was received and placed upon the files of this office on the 8th day of May, 1858.

"Respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(To which defendant objects as incompetent, immaterial, and irrelevant.)

Plaintiff offers in evidence Exhibit "15," certified transcript of judgment in the district court of Dubuque county, Iowa, in which Morris K. Jessup, trustee of the Dubuque and Pacific Railroad Company, was plaintiff and The Dubuque and Pacific Railroad Company

was defendant, and the conveyance recited therein, rendered August 18, 1860, viz:

AUGUST 18, 1860.

MORRIS K. JESSUP *et al.*, Trustees of the Dubuque and Pacific Railroad Co.,
vs.
THE DUBUQUE AND PACIFIC R. R. Co. *et al.* } Chancery.

Now come the parties, by Platt Smith, solicitor for complainants, and James M. McKinley, solicitor for the Dubuque and Pacific Railroad Company, and submit this cause to the court on bill and answer; and thereupon, on consideration thereof and by consent of parties, it is ordered, adjudged, and decreed by the court that the complainants have and recover of the Dubuque and Pacific Railroad Company the sum of $1,720,510, due and in default upon the mortgages named in the bill, and that if they fail to pay the same within ten days their right and equity of redemption in and to the properties mortgaged be and forever remain barred and foreclosed, and the right and title thereof shall be absolute in the said complainants. The complainants, in taking and acquiring the absolute right and title in said property, namely, the Dubuque and Pacific railroad, its franchises, right of way, depot grounds and buildings, rolling stock, lands granted by Congress to aid in con-
67 structing said road remaining undisposed of, and other property mentioned in said mortgages, shall take the same, to be by them conveyed, in conjunction with the Dubuque and Pacific Railroad Company, to the Dubuque and Sioux City Railroad Company in accordance with the terms and conditions hereinafter set forth; and the Dubuque and Sioux City Railroad Company shall have and hold the lands which were granted by Congress to the State of Iowa to aid in building said road and branch, and by the State of Iowa to the Dubuque and Pacific Railroad Company, subject to the same rights and obligations and upon the same terms and conditions as the same were held by the Dubuque and Pacific Railroad Company, it being expressly agreed and understood that the Dubuque and Sioux City Railroad Company is a new company formed under articles of incorporation drawn up and adopted for the benefit of all parties concerned in the Dubuque and Pacific Railroad Company as stockholders, bondholders, or creditors.

And, by consent aforesaid, it is ordered, adjudged, and decreed that the bonded indebtedness of the Dubuque and Pacific Railroad Company shall be exchanged dollar for dollar, with accumulated interest to the date of this decree, for the preferred stock of the Dubuque and Sioux City Railroad Company, certificate of which shall be issued in form as follows:

"*Preferred Shares.*

"No. —. STATE OF IOWA.

"Dubuque and Sioux City Railroad Company.

"This certifies that —— —— — entitled to — preferred shares

of the capital stock of the Dubuque and Sioux City Railroad Company, of one hundred dollars each, transferrable only by the said —— —— or — attorney on the transfer books of the said company on the surrender of this certificate.

"The whole amount of preferred shares of the capital stock is two million dollars, which the company have the right to redeem at par at any time.

"Dubuque, —— —, 186–.

"—— ——, *President.*

"—— ——, *Secretary.*"

68 And that the holders of the preferred shares of the Dubuque and Sioux City Railroad Company shall be entitled to receive a dividend on their shares from year to year — the net earnings of the road, but not in any one year more than seven per cent. on all the stock, in which case the common and preferred shares shall receive the same dividend.

And that the shareholders of the Dubuque and Pacific Railroad Company shall receive in exchange for their stock therein, including dividend, interest to June 1, 1860, on the surrender of the same, common stock in the Dubuque and Sioux City to an equal amount respectively.

That the creditors of the Dubuque and Pacific Railroad Company who hold securities for the amounts owing them by the company shall have and receive in exchange for such securities and in satisfaction of the debts preferred stock in the Dubuque and Sioux City Railroad Company according to the above-written form.

And that the unsecured creditors of the Dubuque and Pacific Railroad Company shall be entitled to receive *a* full satisfaction of their claims and demands against the company common stock of the Dubuque and Sioux City Railroad Company to an amount equal to what may be justly owing to them respectively.

And that the indebtedness of the Dubuque and Pacific Railroad Company for right of way, for construction of the second forty miles of road, for operating expenses, and what may remain due on back pay-rolls and to officers and employés of this company, and for the trust expenses and on moneys advanced to pay taxes, shall be settled and paid for by the Dubuque and Sioux City Railroad Company, and the officers of the last-named company are authorized to pay the same in cash or in preferred stock of their company; and it is further ordered, adjudged, and decreed that this decree shall not absolutely bar, foreclose, or cut off any of the indebtedness aforesaid, but that the holders thereof shall be entitled to

69 have and receive of the Dubuque and Sioux City Railroad Company payment of the same in common stock, preferred stock, or otherwise, according to the nature of their respective claims.

And it is further ordered, adjudged, and decreed that the complainants shall have the right to settle and compromise any claim or claims that may be set up against the Dubuque and Pacific Railroad Company, and that their action therein shall be binding and

effectual against the Dubuque and Sioux City Railroad Company; and it is only such persons as consent to come in under the provisions of this decree that shall be entitled to receive stock in said last-named company for any claim or demand against the Dubuque and Pacific Railroad Company.

And as to the other defendants this continued, with leave to show cause, if any, why this decree should not be held firm and effectual forever.

Costs taxed at $4.50.

Conveyance by the Dubuque and Pacific Railroad Company and Their Trustees to the Dubuque and Sioux City Railroad Company.

Know all men by these presents that whereas the Dubuque and Pacific Railroad Company on the 14th day of March, 1857, made a certain mortgage and deed of trust to Abram S. Hewitt, Thomas E. Walker, Frederick Schichardt, and Curtis B. Raymond, of the Dubuque and Pacific railroad, together with all of the locomotives, cars, buildings, machinery, tools, or implements belonging to or appurtenant to said railroad, and all its franchises, rights, or privileges belonging to said company or in any way pertaining to or appurtenant to said railroad; also the lands granted by Congress to the State of Iowa and by the State to said company *or and* to aid in building said railroad and the branch to Tete des Morts, which said mortgage was to secure the payment of twelve million dollars of construction bonds, with the privilege of issuing three million more; and whereas a large amount of bonds were issued under said mortgage
70 and default was made in the payment of the interest coupons of the same; and whereas Thomas K. Jessup, Platt Smith, W. W. Hamilton, and Herman Gilpcke became and are now the successors of said Hewitt, Walker, Schichardt, and Raymond as trustees of said company; and whereas said Jessup, Smith, Hamilton, and Gelpcke, trustees, successors of the first trustees as aforesaid, commenced an action of foreclosure in the district court of Dubuque county, Iowa, at the August term, 1860, against said company because of the default aforesaid; and whereas a decree of foreclosure was entered at said term by which, among other things, it was ordered, adjudged, and decreed that the said trustees have and recover of the Dubuque and Pacific Railroad Company the sum of $1,722,510, and that unless the same should be paid within ten days from the date of the decree the equity of redemption of said company in said railroad, their franchises and other property aforesaid, should be forever barred and foreclosed; and whereas the said ten days have elapsed and the said sum has not been paid nor the property in any manner redeemed; and whereas, in *completion* of the said foreclosure, a large number of parties interested in the said railroad company, — are the holders of bonds, stocks, and evidence of indebtedness of the company, formed a new company, under the name of the Dubuque and Sioux City Railroad Company, to become the successor of the Dubuque and Pacific Railroad Company, with the intention of acquiring all the rights, franchises, privileges, land

grants, and other properties aforesaid for the purpose of completing said road; and whereas it was further ordered and adjudged in said suit for foreclosure that in case of default aforesaid the said trustees and the Dubuque and Pacific Railroad Company should join in a conveyance of said properties to the Dubuque and Sioux City Railroad Company:

Now, therefore, in consideration of the premises, the said trustees, Thomas K. Jessup, Platt Smith, William W. Hamilton, and Herman Gilpcke, and the Dubuque and Pacific Railroad Com-
71 pany hereby demise, release, sell, and convey to the Dubuque and Sioux City Railroad Company the said railroad, its franchises, appurtenances, and the properties aforesaid; also the said lands granted by Congress, so far as the same remained undisposed of at the time of said foreclosure; to have and to hold the same upon the terms and conditions, rights and privileges, as they were heretofore held by the Dubuque and Pacific Railroad Company.

Witness the hands of said trustees and of the president and secretary of the Dubuque and Pacific Railroad Company and corporate seal August 21, 1866.

HERMAN GILPCKE, *President.*

JAMES M. McKINLEY, *Secretary.* [L. S.]

HERMAN GILPCKE,
PLATT SMITH,
MORRIS K. JESSUP,
W. W. HAMILTON,
Trustees.

Deed duly acknowledged by Herman Gilpcke, Platt Smith, W. W. Hamilton, and James McKinley, officers and trustees above named, in Dubuque county, Iowa, Aug. 21, 1860, before Davis M. McKinley, notary public in said county, and duly acknowleged on August 24, 1860, in city of New York, by Morris K. Jessup, one of said trustees, before A. B. Britton, a commissioner of deeds for the State of Iowa.

The decree and conveyance is duly certified to as follows:

STATE OF IOWA, *Dubuque County,* } ss:

I, P. J. Quigley, clerk of the district court of the State of Iowa in and for Dubuque county, do certify that the annexed and foregoing is a full, true, and complete and compared transcript of the decree and conveyance therein set forth in the case therein mentioned, wherein Morris K. Jessup *et al.*, trustees, etc, were plaintiffs and The Dubuque and Pacific Railroad Company *et al.* were defendants, as fully as the same appears of record and on file in my office.
72 Witness my hand and seal of said district court, affixed at Dubuque city, February 8, 1878.

[Seal District C't Dubuque County, Ia.]

P. J. QUIGLEY, *Clerk,*
By J. M. MUNN, *Deputy.*

(To which defendant- objects as incompetent, immaterial, and irrelevant.)

Plaintiff offers in evidence, as Exhibit "16," a certified copy of an agreement made between the Dubuque and Sicux City Railroad Company and the Iowa Falls and Sioux City Railroad Company January 7, 1868, being the same agreement as is attached to the plaintiff's bill as Exhibit "1" (hereinbefore fully set out in this abstract, pp. 12-16), excepting the acknowledgment, and the said agreement has affixed thereto the acknowledgment duly made by Joseph Herod, secretary of the Iowa Falls and Sioux City Railroad Company, on June 10, 1868, in Dubuque county, before W. E. Mossey, notary public in said county, and the acknowledgment of M. K. Jessup, as president of Dubuque and Sioux City Railroad Company, and John I. Blair, as president of Iowa Falls and Sioux City Railroad Company, on June 6, 1868, in New York city, before Charles Nettleton, commissioner of deeds in New York for Iowa, and is indorsed as recorded in Deed Book "F," Woodbury county, Ia., pp. 523–528.

(To which defendants object as incompetent, immaterial, and irrelevant and not properly certified.)

Plaintiff offers and introduces in evidence, as Exhibit "17," Deed Record "F" of Woodbury county, Iowa, pp. 523 to 528, inclusive, the same being the record of the foregoing agreement (Exhibit "16") between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company January 7, 1868, filed for record in said Woodbury county July 31, 1869, and the same is the same as Exhibit "16" aforesaid and fully set out as Exhibit "A" to petition and the acknowledgment above set out.

(To which defendants object as last above, and for the further reason that it is not an instrument to be recorded.)

73 Plaintiff offers and introduces in evidence, as Exhibit "18," certified copy of a resolution of the board of directors of the Iowa Falls and Sioux City Railroad Company, dated February 16, 1869, accepting the grant confirmed by chapter 124 of Laws of 12th General Assembly of Iowa, and certificate thereto, viz:

Office of Iowa Falls and Sioux City R. R. Co.

DUBUQUE, IOWA, *Feb.* 16, 1869.

At a meeting of the board of directors of said company, in accordance with previous notice—present, W. W. Walker, Platt Smith, and John F. Duncombe in person, and John I. Blair by his proxy, W. W. Walker, and Joseph Herod, secretary—the following resolution was passed:

Resolved, That this company, in case the census board of the State of Iowa, to which application has been made for so much of the land grant mentioned and described in chapter 124 of the Laws of the Twelfth General Assembly of Iowa, approved April 7, 1868,

as is or may be applicable to the construction of the railroad from Iowa Falls to Sioux City, confer the same, do hereby accept of said land grant, subject to all the sections, terms, and conditions of said act, and the vice-president of the company (the president being absent from the State) and the secretary are hereby authorized to attest and file this acceptance in the office of the secretary of state so soon as said grant shall be confirmed.

THE IOWA FALLS & SIOUX CITY R. R. CO.,
By PLATT SMITH, *Vice President.*

(Certificates attached as follows:)

STATE OF IOWA, *Dubuque County,* } ss:

I, Joseph Herod, secretary of the Iowa Falls and Sioux City Railroad Company, do hereby certify that the above and foregoing is a correct copy of a resolution passed by the board of directors of said company at the time therein mentioned.

Witness my hand and seal of said company attached this 16th day February, 1869.

[SEAL.] JOSEPH HEROD,
Sec'y Iowa Falls and Sioux City R. R. Co.

74 Filed in office of secretary of state February 18, 1869.
ED. WRIGHT,
Secretary of State.

STATE OF IOWA, ss:

I, Joseph T. Young, secretary of the State of Iowa, do hereby certify that the foregoing is a full, true, and accurate copy of the acceptance by the Iowa Falls and Sioux City Railroad Company of the land grant mentioned in chapter 124, Laws of the Twelfth General Assembly of Iowa, together with date of filing the same in this office.

In witness whereof I have hereunto set my hand and affixed the seal of the State, at Des Moines, this 14th day of August, 1877.

[GREAT SEAL.] JOSIAH T. YOUNG,
Secretary of State.

(To which defendants object as above and as not properly certified.)

Plaintiff offers and introduces in evidence, as Exhibit "19," a certified copy of the certificate made by governor of Iowa of the construction of the portion of the road to be built by the Iowa Falls and Sioux City Railroad Company, dated March 9, 1871, viz:

STATE OF IOWA.

Hon. Columbus Delano, Secretary of the Interior, Washington, D. C.:

I, Samuel Merrill, governor of the State of Iowa, do hereby certify that the Iowa Falls and Sioux City Railroad Company, organized under the laws of Iowa, have constructed and put in operation a rail-

road from Iowa Falls on the most practicable route by way of Webster City and Fort Dodge to Sioux City, which route is at points within the limits of the land grant referred to and mentioned in the act of Congress approved March 2, 1868, entitled "An act extending the time for the completion of the Dubuque and Sioux City Railroad."

And I further certify that said railroad was completed to Fort Dodge the first day of July, 1869, and thereafter at the rate
75 of forty miles or more each year, and the said road is constructed, operated, and maintained as one continuous and unbroken line of railroad from Dubuque to Sioux City and in all respects in accordance with the laws of Congress and of the State of Iowa in relation thereto, as shown by maps hereto attached.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa this 9th day of March, 1871.

[SEAL.] SAMUEL MERRILL,
Governor of Iowa.

ED. WRIGHT,
Secretary of State.

(*Certificate Attached.*)

STATE OF IOWA, *ss:*

I, Josiah T. Young, secretary of state of Iowa, hereby certify that the foregoing is a full, true, and accurate copy of a certificate from Governor Samuel Merrill showing the completion of the Iowa Falls and Sioux City railroad.

In testimony whereof I have set my hand and affixed hereunto the great seal, etc., this August 15, 1877.

(Great Seal of Iowa.) JOSIAH T. YOUNG,
Sec'y of State.

(To which defendants object as above and as not certified by department at Washington.)

Plaintiff offers and introduces in evidence as Exhibit "20" duly certified copy of certificate of the governor of Iowa of the completion of a portion of the railroad from Dubuque to Sioux City on Dec. 31, 1869, and also certificate of governor as to completion of road, dated Dec. 30, 1871, viz:

(No. 1.)

I, Samuel Merrill, governor of Iowa, do hereby certify that the plat or map of the Dubuque and Sioux City railroad has been duly filed in my office by said Dubuque and Sioux City Railroad Company, and shows that portion of the railroad commencing near the town of Parkersburg, at a point on the line of the said road 120 miles westwardly from the eastern terminus of said road, in section 29,

township 90, range 17 west 5th P. M., and ending at east bank
76 of Iowa river, at the town of Iowa Falls, Iowa, in section 18, township 89, range 20 west 5th P. M.; this ending point being 22½ miles from point above described as the commencing point of said section of 22½ miles, which has been duly completed and equipped as required by the act of Congress approved May 15, 1856.

In testimony whereof I have hereunto set my hand and the great seal of the State Dec. 31, 1869.

[SEAL.] SAMUEL MERRILL.

By the governor:
ED. WRIGHT,
Secretary of State.

(No. 2.)

DES MOINES, IOWA, *Dec.* 30, 1871.

In accordance with the provisions of an act of Congress entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May 15, 1856, I hereby certify that there has been constructed a railroad from the mouth of the Tete des Morts to the nearest point on the railroad "from the city of Dubuque to a point on the Missouri river near Sioux City," in the State of Iowa, as shown by the map hereto attached, and that the said road is now completed and open for business as a first-class railroad.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of state Dec. 30, 1871.

[L. S.] SAMUEL MERRILL.

ED. WRIGHT,
Secretary of State.

(*Certificate Attached.*)

STATE OF IOWA, *ss:*

I, Josiah T. Young, secretary of the State of Iowa, hereby certify that the foregoing on page "No. one" contains a full, true, and complete copy of the certificate of Samuel Merrill, governor of Iowa, showing the completion of the seventh section of 22½ miles of the Dubuque and Sioux City Railroad, commencing near Par-
77 kersburg and ending at Iowa Falls. Said certificate was filed in the office of secretary of state Dec. 31, 1869; and I further certify that page "No. two" contains a full, true, and complete copy of the certificate of said Samuel Merrill, governor of Iowa, showing the completion of a railroad from the mouth of the Tete des Morts to the nearest point on the railroad from the city of Dubuque to a point on the Missouri river near Sioux City, in said State of Iowa.

In witness whereof I have hereunto set my hand and affixed the great seal of the State of Iowa, at Des Moines, this 31st day of June, 1878.

[L. S.] JOSIAH T. YOUNG,
Secretary of State.

(To which defendant objected as last above.)

Plaintiff offers in evidence as Exhibit "21" original articles of incorporation of the Sioux City and Iowa Falls Town Lot and Land Company (plaintiff herein) (leave given to substitute copy), showing that said plaintiff became duly incorporated July 20, 1871, to continue twenty years, and is organized to buy, sell, own, and deal in real estate in Iowa and do other business usually transacted by corporations for pecuniary profit; that said articles were recorded in Linn county (the county in which its principal place of business is located) June 27, 1871, and the office of secretary of state Sep. 20, 1871.

(To which defendant objected as incompetent, immaterial, and irrelevant.)

Plaintiff offers and introduces in evidence as Exhibit "22" the original patent from the State of Iowa to the Iowa Falls and Sioux City Railroad Company to certain lands granted by act of Congress approved May 15, 1856, which includes by specific description the land in suit, and is dated July 5, 1871, and the record thereof in vol. "A," pages 265–268, in the State land office, with the filing endorsed thereon of its record in Woodbury county, Iowa, on August 25, 1871, in Book —, and endorsement therein of "Entered for taxation August 25, 1871. G. W. Wakefield, auditor."

(Leave given to withdraw original and substitue copy.)

78 (To which defendants objected as last above and as not showing any general title in plaintiff.)

Plaintiff offers and introduces in evidence as Exhibit "23" original warranty deed from Iowa Falls and Sioux City Railroad Company, duly signed, executed, and acknowledged, to Charles E. Vail of the land in suit, for consideration of $1,000, dated June 9, 1871, with endorsement thereon of filing for record and recording thereof in office of recorder of Woodbury county, Iowa, August 25, 1871, in Book "H," pages 283, 284, and endorsement of "Entered for taxation August 25, 1871. G. W. Wakefield, auditor."

(Leave given to withdraw original and substitute copy.)
(Defendants object to this testimony as last above.)

Plaintiff offers and introduces in evidence as Exhibit "24" original warranty deed from Charles E. Vail (bachelor) to John I. Blair for land in suit, duly executed and acknowledged, for consideration of $1,000, dated June 10, 1871, with endorsement of filing for record thereon showing that said deed was recorded in office of recorder of deeds of Woodbury county, Iowa, Jan. 19, 1872, in Book "H" of deed records, page 871, and entered for taxation in county auditor's office same date.

(Leave given to withdraw original and substitute copy.)
(Objected to by defendants as last above.)

Plaintiff offers and introduces in evidence as Exhibit "25" original warranty deed from John I. Blair and wife to Sioux City and Iowa Falls Town Lot and Land Company (plaintiff) for land in suit, duly executed and acknowledged, for the consideration of

$1,000, dated July 1, 1871, with indorsements thereon showing it was recorded in the office of recorder of deeds of Woodbury county, Iowa, on August 9, 1871, in Book "H" of land records, pages 246–'7, and entered for taxation same date in office of county auditor.

Plaintiff offers in evidence as Exhibit "26" certified copy of original memorandum pertaining to the Iowa Falls and Sioux
79 City railroad, formerly Dubuque and Pacific railroad, with certificate of Commissioner General Land Office, dated May 5, 1879, viz:

Iowa Falls and Sioux City railroad, formerly Dubuque and Sioux City, which was formerly Dubuque and Pacific railroad.

Date of laws.	Map filed by companies.	Case.
May 15, 1856, Stat. 11, p. 9. 6 and 15 mile limits. June 2, 1864, Stat. 13, p. 98. Act authorizing the D. and S. C. R. R. Co. to change their line of route between Fort Dodge and Sioux City.	Map showing definite location of Dubuque and Pacific railroad from Dubuque to Sioux City, Iowa, with a branch to mouth of Tete des Morts creek on the Mississippi river, opposite Galena, Ill. (giving dates of field work). Survey ordered by resolution of board of directors May 26, 1856. Certified by officers of the company Sept. 27, 1856, and by the governor of Iowa Oct. 2, 1856. Received at General Land Office Oct. 13, 1856. Right of road attaches from date of survey in field, which was from May 30 to August 31, 1856, except what was located prior to the act.	113
March 2, 1868, Stat. 15, p. 38. Extending time for completion of road to Jan. 1, 1872.	Map of relocation of the road between Fort Dodge and Sioux City, as authorized by act of June 2, 1864, and adopted by board of directors of Dubuque and Sioux City Railroad Company, as certified by the officers May 26, 1865. Filed in General Land Office August 15, 1865, by F. P. *Wil* Wilson. Also duplicate of same received from Secretary of Interior Oct. 14, 1865, dated Oct. 4, 1865, stating that the map was filed in due time.	313
80	Map of Iowa Falls and Sioux City railroad constructed from Iowa Falls to Sioux City, certified by governor of Iowa March 9, 1871. Received at the General Land Office March 15, 1871, with letter from Secretary of the Interior March 14, 1871. (I. 3917.)	313
	Map showing line of Tete des Morts branch as constructed, from about 1¼ miles south of Dubuque to mouth of Tete des Morts creek, 10 78-100 miles. Sworn to and subscribed by the chief engineer and president of the Dubuque, Bellevue and Miss. R. R. Co. Dec. 26, 1871; certified by governor of Iowa Dec. 30, 1871. Received at the General Land Office, with letter of Secretary of Interior, Jan. 4, 1872. (I. 76,567.)	313

(*Certificate Attached.*)

DEPARTMENT OF INTERIOR, *May* 5, 1879.

I, J. A. Williamson, Commissioner of General Land Office, do hereby certify that the annexed copy is a true and literal exemplification of the original memorandum pertaining to the Dubuque and Pacific railroad prepared and used by this office.

In witness whereof I have hereunto subscribed my name and caused the seal of the office to be affixed, at Washington, on day and year above written.

[SEAL.] J. A. WILLIAMSON,
Commissioner General Land Office.

(Objected to as incompetent, immaterial, and irrelevant, and, further, for the reason that the paper is now offered as a part of the deposition of Wm. T. Steiger on trial of case of I., F. & S. C. R. R. Co. *vs.* John Beck, and not competent.)

81 Plaintiff offers in evidence as Exhibit "27" certified copy of letter from Commissioner of General Land Office to B. Henn, dated Oct. 13, 1858 (the same being Exhibit "B" in the certificate certifying to said letter), viz:

"GENERAL LAND OFFICE, *Oct.* 13, 1856.

"B. Henn, railroad agent:

"I have the honor to acknowledge receipt of your two several communications of this date transmitting the duly certified map of definite location of the Dubuque and Pacific railroad in Iowa and requesting the withdrawal of certain townships in addition to the lands heretofore withdrawn for railroads in Iowa. In reply I have to inform you that the map of definite location of the road has been placed on file in this office, and that I have this day instructed the land officers at Sioux City to withhold from sale or location the additional townships indicated on the diagram which accompanied your letter.

"THOS. A. HENDRICKS,
"*Commissioner.*"

Plaintiff offers and introduces in evidence as Exhibit "28" certified copy of letter from the Secretary of Interior to Commissioner of General Land Office, dated Mar. 14, 1871 (the same being Exhibit "C" in the certificate certifying to said letter), viz:

"DEPARTMENT OF INTERIOR, *March* 14, 1871.

"To Commissioner General Land Office:

"I transmit herewith for appropriate action a certificate of governor of Iowa of 9th inst. showing the completion of Iowa Falls and Sioux City railroad, being a portion of a railroad "from Dubuque to a point on the Missouri river near Sioux City," provided for by act of May 15, 1856, and acts supplemented thereto granting lands to the State for railroad purposes.

"C. DELANO, *Secretary.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence as Exhibit "29" certified copy of letter from the Secretary of the Interior to Commissioner General Land Office, dated Jan. 4, 1872, the same being marked Exhibit "D" (with certificate certifying to same), viz:

82 "DEPARTMENT OF INTERIOR, *Jan.* 4, 1872.

"Commissioner General Land Office:

"I transmit herewith for appropriate action a map of Dubuque, Bellevue and Missouri railroad (received yesterday from governor of Iowa, with his certificate and those of the president and chief engineer of the company) showing the line of said road as completed from a point on the bank of Mississippi river $1\frac{1}{4}$ miles south of Dubuque, thence along the right bank of said river to the mouth of Tete des Morts creek, a distance of $10\frac{78}{100}$ miles. This road is commonly known as the Tete des Morts Branch of Dubuque and Sioux City railroad, and was open for business Dec. 23, 1871.

"C. DELANO, *Secretary.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence as Exhibit "30" certified copy of letter dated Sept. 4, 1856, from B. Henn to Commissioner General Land Office (the same marked Exhibit "F" in certificate certifying the same), viz:

"SEPTEMBER 4, 1856.

"SIR: For and in behalf of the State of Iowa and the four several railroad companies which, by the act of the Legislative Assembly of said State approved July 14, 1856, were constituted the beneficiaries of the grants of land made to said State by the act of Congress approved May 15, 1856, and as the legally appointed agent of said State and of said companies I hereby select the unsold lands in the sections and parts of sections designated by odd numbers between the six and fifteen mile limits on each of the roads to make up the deficiency caused in the odd-numbered sections within the six-mile limits by sale or valid pre-emption rights existing prior to the grants made to said State by said act of Congress.

"BERNHART HENN.

"Hon. Thos. A. Hendricks, Commissioner General Land Office, Washington, D. C."

(Defendants object as last above.)

Plaintiff offers and introduces in evidence as Exhibit "31" certified copy of letter from Commissioner General Land Office
83 to register and receiver Sioux City, Iowa, dated April 14, 1858 (the same being marked Exhibit "L" in the certificate attached to said letter), viz:

"GENERAL LAND OFFICE, *April* 14, 1858.

"Register and receiver, Sioux City, Iowa:

"Herewith I inclose list of lands in the district of lands subject to

sale at Sioux City, Iowa, selected for Dubuque and Pacific railroad and branch under act of May 15, 1856, which appear to be vacant and undisposed of in the sections designated by odd numbers within six and fifteen mile limits of said road. You will carefully compare these lists with the plats and tract books of your office and report as soon as practicable whether any of the tracts therein described have been sold or otherwise disposed of. Should any such be found you will state in your report the date of sale, name of purchaser, and the number of the certificate or warrant by which entry or location was made.

"THOS. A. HENDRICKS,
"*Commissioner.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence, as Exhibit "32," certified copy of a letter from Commissioner to register and receiver, Sioux City, dated June 24, 1858 (the same being marked Exhibit "M" in the certificate certifying to the same), viz:

"GENERAL LAND OFFICE, *June* 24, 1858.

"Register, Sioux City:

"I return herewith the list of vacant lands in your district received with your letter of 31st ult., it being imperfect, the number of acres vacant having been omitted. You will return the list perfected as soon as possible.

"THOS. A. HENDRICKS,
"*Commissioner.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence, as Exhibit "33," certified copy of letter from Commissioner to register and receiver
84 at Sioux City, Iowa, under date of May 20, 1870 (the same being marked Exhibit "P" in the certificate certifying to said letter), viz:

"GENERAL LAND OFFICE, *May* 20, 1870.

"Register and receiver, Sioux City:

"Herewith I transmit two lists of selections under act of Congress of May 15, 1856, which are copies of originals received from you Dec. 6 last, embracing tracts selected within the 6 and 15 mile limits by the agent of the Iowa Falls and Sioux City Railroad Company, formerly known as the Dubuque and Pacific Railroad Company, containing in the aggregate 4,616.58 acres. It is shown that we fully adjusted the grant of May 15, 1856, made to the State for Dubuque and Pacific Railroad Company in April, 1863, and any additional selections by the Iowa Falls and Sioux City Railroad Company, as assignee, are not valid. The 'selections' as such, described in the accompanying lists, are this day cancelled. You will please note the same on your records, referring to the date of this letter, and notify T. J. Stone, agent of said company, of our action. I also transmit copies of two lists which are not approved by you,

embracing 5,030.34 acres on lands selected under said act, by said railroad company, within the six and fifteen mile limits and shown to be in conflict with prior homestead entries and State swamp selections. They are also this day cancelled. Note the same in your records and notify the agent.

"JOS. S. WILSON,
"*Commissioner.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence, as Exhibit "34," certified copy of letter from Commissioner to register and receiver, Sioux City, Iowa, under date of June 23, 1871 (the same being marked "Q" in the certificate certifying to the same), viz:

"GENERAL LAND OFFICE, *Jan.* 23, 1871.

"Register and receiver, Sioux City:

"I inclose herewith a list embracing tracts falling within the six and fifteen mile limits of the Iowa Falls and Sioux City rail-
85 road of Iowa. The same were selected November 17, 1869, as enuring under act of May 15, 1856, and March 2, 1868, and inadvertently cancelled by this office May 20, 1870.

"When the railroad grant was adjusted in 1863, it was intended to give the road the full quantity granted by the law, but since then the United States Supreme Court by its decision at December term, 1868, in the Woolcott case set aside the portion previously approved for the road falling within the limits of the old lists, approved under the Des Moines river grant of 1846, amounting in the aggregate to 77,534 acres which had been certified to the State for the Des Moines river. The effect of this is to create a deficiency in the quantity granted by law for the road, and consequently the cancellations referred were improperly made on the basis that the railroad had received its full grant.

"The railroad selections in the list herewith have therefore been reinstated on the records of this office, and you will please make the corresponding annotations on yours, referring to this letter.

"JOS. S. WILSON,
"*Commissioner.*"

Plaintiff offers in evidence as Exhibit "35" the certificates attached to said exhibits ("33" and "34"), being marked as Exhibits "P" and "G," viz:

"DEPARTMENT OF THE INTERIOR, *May* 5, 1879.

"I, J. A. Williamson, Commissioner of General Land Office, do hereby certify that the annexed copies are true and literal exemplifications from the originals and record of the originals in this office.

"In testimony whereof I have hereunto subscribed my hand and

caused the seal of this office to be affixed, at the city of Washington, the day and year above written.

"J. A. WILLIAMSON,
[SEAL.] "*Commissioner General Land Office.*"

(To which defendants object as last above.)

Plaintiff offers and introduces in evidence as Exhibit "36" certificate attached to said Exhibits "27," "28," "29," "30," "31," and "32" (being marked as Exhibits "B," "C," "D," "F," "L," and "M" by Commissioner General Land Office under date May 5, 1879), viz:

86 "DEPARTMENT OF INTERIOR,
"GENERAL LAND OFFICE, *May* 5, 1879.

"I, J. A. Williamson, Commissioner of General Land Office, do hereby certify that the annexed copies are true and literal exemplifications from the originals and records of the originals in this office.

"In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on day and year above written.

"J. A. WILLIAMSON,
"*Commissioner of the General Land Office.*"

D. T. HEDGES (called for plaintiff), being duly sworn, says:

I am forty-seven years of age; occupation, merchant, and reside at Sioux City, Iowa. I have lived there twenty-seven years. I have known the tract in suit all that time. I have known it very well since 1871 and knew it before that, but not so much before that. I have been in business located near this track. It was the milling business, which I commenced in 1871. I have used a portion of the land in suit. I commenced using it in 1879 and 1880.

Q. State under what arrangement you used the land.

(Objected to by defendant as incompetent and immaterial.)

A. I leased it from the land company through John Pierce as agent. I leased the north and east portion of it, east of the Floyd. This would be about 100 acres out of the 160 acres. I occupied it as a pasture part of the time. In 1882 and 1883 I released it verbally to T. A. Hughes. In 1880 and 1881 I finished enclosing on the north and east side of the Floyd with a wire fence. I did most of it in 1880. I used it for a pasture in 1880 and cut weeds off of it to fill in a dam. I don't recollect of any interference with my use of it in 1880, 1881, and 1882. I think there had been a small piece plowed on it before I occupied it, on the north and east side of the Floyd.

87 The lease here shown me is signed by J. Van Deventer, president of the company, and myself as lessee. That is the lease I obtained in 1882, and it was extended by agreement with Joy & Wright, agents of the company.

Lease offered in evidence as Exhibit "38."

(Objected to by defendant as incompetent, immaterial, and irrelevant.)

Lease introduced as Exhibit "38," and is the original written lease made April, 1882, by the Sioux City and Iowa Falls Town Lot and Land Company to D. T. Hedges, all of north half of northwest quarter of section 27, township 89, range 47, east of the Floyd, for rent of $25, to be used for agricultural purposes for season of 1882, and on the back thereof is an indorsement of extension of lease for one year from March, 1883, on same terms and signed by agents of plaintiff.

(Witness resumes:) The fence I built helped enclose the north and east side of the Floyd river, and the river formed the balance of the enclosure. We built a fence on the east side, from the southeast corner of the quarter west to the Floyd and some fence from the dam. The idea was to enclose it. The fence and the river formed the enclosure. I don't recollect of any objections being made to my use and occupancy prior to 1882; the first objection made to my use of it was in latter part of 1882, or during the year 1883. I don't now recollect of any improvements on any part of this quarter section south of the Floyd when we commenced milling business in 1871; none of the south part of it was then enclosed. I have no recollection of there being any improvements on the south part prior to 1871.

Our mill was situated due west from the quarter, there being only the Floyd river between our mill and this land at place where mill was located, and the land is in full view from the mill. We would see this land during that time once a week or oftener, and drove right along by west of it going to and from the mill. Prior to my leasing this ground on the north and east of Floyd river I noticed that there had been some plowing done there. I paid rent to Pierce and Joy & Wright as agents of the land company. The line
88 of the railroad runs 250 or 300 feet west of his land; only one line running along Floyd river from Sioux City eastward. There is one track operated by the Illinois Central and leased to St. Paul. I think this track was built prior to 1870.

Cross-examination:

I don't recollect any house of Thos. L. Griffey's being on this ground in 1856, '57, or '58, south of the Floyd or west of the Floyd. I don't know anything about a house being there then.

JOHN P. ALLISON (called for plaintiff), sworn, says:

I am treasurer of Woodbury county, Iowa, and have the tax books of said county in my possession for 1872 to 1884, inclusive, and that relates to the land in suit.

Q. You may turn to the tax-list of 1872, and state whether the northwest quarter of section 27, township 89, range 47, is entered therein.

(Objected to by defendant as incompetent, immaterial, and irrelevant.)

A. It is assessed in forties, on page 118 of Tax Book, 1872, in the name of the Sioux City and Iowa Falls Town Lot and Land Company—amount, $36.28—and tax book shows the payment of the tax September 20, 1873, by Iowa Falls and Sioux City Railroad Company. The land is also entered in the Tax Book of 1873, which I have here, and assessed to plaintiff, and amount of taxes, $22.40, and the record shows that said tax was paid by plaintiff Jan. 9, 1870.

The assessment in 1874 is assessed, as shown by the book I have here, to plaintiff; amounted to $27.52, and it was paid, as shown by said record, by the plaintiff July 6, 1875. I have here the tax-list of 1875, and it shows the land in suit was assessed to plaintiff, amount $33.00, and was paid by plaintiff January 21, 1876.

I have the tax-list here of 1876. The land in suit appears therein assessed to plaintiff, amount $40.72, and paid by plaintiff Feb. 1, 1877. I have the tax-list here of 1877. The land in suit appears therein assessed to plaintiff, amount $155.16, and paid by plaintiff February 8, 1878. I have the tax-list of 1878 here. The
89 land in suit was assessed in blank, amount of tax, $155.14, and paid by plaintiff February 20, 1879. I have the tax-list of 1879 here. The land in suit appears therein assessed to plaintiff, and paid Feb. 9, 1880, by plaintiff. I have the tax-list of 1880 here. The land in suit was assessed in blank, amount of tax, $189.40, and paid by plaintiff Jan. 10, 1881. I have the tax-list of 1881 here. The land in suit was assessed in blank, amount of tax, $187.21, and paid by plaintiff January 27, 1882. I have the tax-list of 188-. The land in suit was assessed in blank, amount, $211.60, and paid by plaintiff January 9, 1883.

(All the testimony objected to by defendants as incompetent, immaterial, and irrelevant.)

JOHN PIERCE (called for the plaintiff), sworn, says:

I am 45 years old; reside in Sioux City, and a real-estate dealer. I have lived at Sioux City sixteen years, and during that time I have been a real-estate dealer. I was agent for the Iowa Railroad Land Company. My agency commenced in 1870 or 1871. I know the land in suit. I don't know whether there was any improvements on it when I first knew it or not. The improvements that were on it when it was first brought to my notice was two houses, I believe, south of the mill then—about two blocks from the mill—about half way between Seventh street and the mill. I don't know who was living in them. I was down on this land with Philo Hall once. He was general manager, I suppose. This must have been in 1881. There were two houses there then. Mr. Needham lived in one. As agent of the company, I leased this land to Hedges for 1881 and 1882. It may have been the part north and east of the Floyd. I think it had been enclosed for several years north and east of the Floyd. I think before I was agent John Cleghorn was agent and

W. W. Walker was here sometimes. He lived at Cedar Rapids and Cleghorn lived here. I ceased to act for the company in 1882. I must have been here six or seven years before I took any particular notice of the land.

Cross-examination:

90 The first time I noticed any buildings on the land was in 1878. What I did was in connection with the Iowa Railroad Land Company.

Redirect examination:

I delivered Hedges' lease to him. It was made at Cedar Rapids. The lease here shown me as Exhibit "38" (heretofore introduced in evidence) is the lease we delivered to Mr. Hedges, and the lease for previous years was of the same kind. When Hedges applied to lease the land I mailed it to the Iowa Railroad Land Company, and this is one of the leases I received in response to our negotiations.

Recross-examination:

I presume the Iowa Railroad Land Company and the plaintiff are composed of the same parties in interest. They had the same office and same general manager.

T. J. KINKAID (called for plaintiff), sworn, says:

I reside at Sioux City, Iowa, and have since the spring of 1856. I know the land in suit. I was at Sioux City the time the engineers of the Dubuque and Pacific Railroad Company made the survey of a line of railroad from Sioux City.

Q. Where did the engineers commence, if you know?

(Objected to as incompetent, immaterial, and irrelevant by defendants.)

A. They commenced at an old tree that stood down on "Gumbo Point" and near mouth of the Floyd. The tree was in what was called Sioux City East Addition and was but a short distance from the Missouri river bank. They commenced surveying from that point and run up the Floyd. It was called the Dubuque and Pacific railroad. It was about a direct line from that tree up the Floyd bottom. I could not state the exact distance this surveyed line was from the land in question. It was not far from the west line of the quarter section in suit where it went past it. It was but a short distance. They run their line and drove stakes from the start and as they went up the Floyd. I saw the stakes up the Floyd after they made the survey for eight or nine miles. If
91 I recollect right, this was along some time in July and in the year 1856. I only know of but one survey up the Floyd at that time. I never knew of any other survey up there till the St. Paul line was surveyed. The engineer of the Dubuque and Pacific railroad started from the tree on the bank of the Missouri river and went up the Floyd, and I saw them working for eight or nine miles up the Floyd, and they were still going north then and run-

ning their line and driving stakes. When the railroad was afterwards constructed it was constructed near or on the same line that I saw surveyed in July, 1856. At that time Sioux City was quite a small place and there was a United States land office here at that time. The survey of this road was talked over in the place at that time.

They commenced the survey at the lone tree on the bank of the Missouri river about nine o'clook in the morning, and I saw them out at Hungerford's—eight or nine miles out—at five in the evening. I could not tell how far apart the stakes were driven, but the distance of ordinary surveys, I presume. There were red marks on the stakes. There were no improvements on the quarter section in suit at that time that I ever saw. I knew Thomas L. Griffey at that time. I don't know where he lived. He was on the wing; sometimes here and sometimes elsewhere. I never saw or knew of any improvements on the land in suit during 1856. I did not see any in 1857. There was no one living on it in 1857, that I knew of, and there was no one living there in 1858. I don't know of any improvements or cultivation on this land in 1856, '57, or '58. I think there was some cultivation done on it in 1859 or 1860. I think John or Charles Doss did cultivate a piece of that land and raised some crops on it or something. I cannot fix the time. I never saw any improvements or cultivation of it before Doss cultivated it.

Cross-examination:

I was boarding in Sioux City at the time this surveying party started out from this tree. There was quite a number of us went down to see them. They said they were going to survey the
92 Dubuque and Pacific road, and it was the understanding that they were the surveyors, and it was the general talk. I went up Perry creek that day and laid the foundation for a pre-emption, and I came back to Sioux City in about three hours, and came back along the divide opposite Hungerford's. I talked with the surveyors that day. I saw the surveyors as I came back from Perry creek and could see them at work. I could see from where I was over to Hungerford's place. I know that from where I was I could see the surveyors very plainly. I had nothing to do with this land in suit in 1856–'7 or 1858. I never saw a frame house on it in 1856, '57, or '58, that I remember of. I knew that Griffey claimed this quarter section. We generally knew every house that went up; they were pretty few, anyhow. There was no house there that I ever saw. I had no interest in this quarter any more than the club had, as we called ourselves at that time, the "Claim club," and I knew that Griffey called it his pre-emption.

Redirect examination:

I remember of building a house for Judge Hubbard in Middle Sioux City. There was no house up the Floyd above it. Judge Hubbard's house was south of the land in suit, and we could see

from there over the land in suit, and it was level and there was no house to be seen from there up the Floyd.

I was up the Floyd several times after the survey in 1856 and could see the stakes still there. I noticed them up as far as Fuller's pre-emption. I saw them when I built his house. The "Claim club" I spoke of was formed here in Sioux City to protect each other, and was formed in 1855. I know Griffey was here a part of the time in 1857. He has been living for many years in Dakota City, Neb.

Cross-examination:

I never run or knew the lines of this quarter section.

(Defendants objected to the testimony of this witness as incompetent, immaterial, and irrelevant.)

93 Plaintiff offers in evidence as Exhibit "38" original agreement made between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Com- on May 20, 1875, which in substance is as follows:

Whereas the lands granted by the act of Congress to the State of Iowa to aid in the construction of a line of railroad from Dubuque to Sioux City, known as the land grant to the Dubuque and Pacific Railroad Company, are now owned in part by the Dubuque and Sioux City Railroad Company, and in part by the Iowa Falls and Sioux City Railroad Company; and

Whereas controversies have arisen between the said companies as to the nature and extent of their respective rights and interests in and to the said land:

Now, therefore, for the purpose of making a full, final, and complete adjustment of all matters of difference between the said companies growing out of the said land grant or in any way connected therewith and now existing or which may hereafter arise, the said companies hereby mutually do and agree as follows:

1. All suits now pending between the two companies to be withdrawn, each party paying its own costs.

2. The said companies hereby ordain and establish as and for the dividing line between their respective portions of said grant of lands, not only as to those lands already certified under the grant, but also as to those lands which may be hereafter acquired under it, the line laid down and designated on the plat of townships numbered 88, 89, 90, 91, 92, 93, all in range 36, which plat is hereto attached, marked "A," the said Dubuque and Sioux City Railroad Company taking and holding as its sole and exclusive property all of the said lands embraced within the grant lying east of the said dividing line excepting the tracts already sold by the Iowa Falls and Sioux City Railroad Company hereafter mentioned, and the said Iowa Falls and Sioux City Railroad Company taking and holding as its sole and exclusive property all of said lands embraced within the grant lying west of said line; and for the purpose of making effectual the said

division line and securing to the Dubuque and Sioux City
94 Railroad Company the exclusive and undisputed ownership of all the granted lands already certified lying east of said dividing line, the said Iowa Falls and Sioux City Railroad Company does hereby agree to execute and deliver to said Dubuque and Sioux City Railroad Company a good and sufficient conveyance of all the right, title, and interest of, in, and to said certified lands lying east of said line, excepting therefrom only those tracts thereof which have been already sold by said Iowa Falls and Sioux City Railroad Company, the tracts to be conveyed composing 33,472$\frac{74}{100}$ acres, and being more particularly mentioned and described in Schedule "B," hereto annexed.

It is understood that such conveyance shall contain the usual covenant against any acts of the grantor affecting such lands, but that said lands are to be conveyed subject to the taxes of 1874.

And for the like purpose of making such division line effectual as to the grant lands east thereof, including those lands which may be hereafter acquired as well as those now certified, the said Iowa Falls and Sioux City Railroad Company hereby agrees to execute from time to time to the Dubuque and Sioux City Railroad Company such further conveyances, agreements, releases, or assurances of title as may be necessary or essential to vest in the company all the right, title, and interest which the said Iowa Falls and Sioux City Railroad Company now has or may hereafter acquire by virtue of the grant of, in, and to all of the said grant lands lying east of said dividing line; and with the purpose of making said division line effectual as to all of said lands lying west thereof, the said Dubuque and Sioux City Railroad Company does hereby agree to make to the Iowa Falls and Sioux City Railroad Company all such conveyances, agreements, releases, or assurances of title from time to time, and, whenever the same are or may become necessary or essential, to vest in the Iowa Falls and Sioux City Railroad Company all the right, title, and interest which the said Dubuque and Pacific Railroad
Company now has or may hereafter acquire of, in, and to all
95 the land embraced within the grant lying west of said dividing line, including within the scope and meaning of this agreement those lands which may hereafter be acquired as well as those already certified.

It is understood and agreed that the costs of acquiring any of the grant lands not already certified shall be borne by the company to which the same shall accrue under the foregoing agreement.

It is understood and agreed that the proceeds of the sale of 525.77, being part section 3, township 90, range 37, by the Dubuque and Sioux City Railroad Company shall be offset by the sale of 520 acres sold by the Iowa Falls and Sioux City Railroad Company, and that the title in each case be confirmed to the purchaser by such conveyance as may be necessary or essential, and that any other sales heretofore made by either company from the portion of the grant lands of the other company as herein divided shall be adjusted by the payment in cash of the purchase-money for which the tracts were sold to the company to which the tracts would accrue

under this division, such last-named company to execute therefore necessary conveyances to confirm the title to the other company.

4. The Iowa Falls and Sioux City Railroad Company does hereby agree to release the Dubuque and Sioux City Railroad Company from all claims for taxes on lands conveyed by said Iowa Falls and Sioux City Railroad Company to said Dubuque and Sioux City Railroad Company under this agreement.

5. It is understood and agreed that this settlement is a full, final, and complete adjustment of all questions of difference growing out of the said grant of lands or in any manner connected therewith, and that any failure of the title to any part of said lands lying east of said dividing line as the same is hereby established shall be borne solely by the Dubuque and Sioux City Railroad Company, without any claim for reimbursement upon the Iowa Falls and Sioux City Railroad Company, and that any failure of the title to any part of said lands lying west of said dividing line as the same is hereby established shall be borne solely by said Iowa Falls
96 and Sioux City Railroad Company, without any claim for reimbursement upon the Dubuque and Sioux City Railroad Company.

Duly signed on May 20, 1875, by the president of said company, and attested by the secretary, with seal of each company affixed, and execution duly acknowledged.

Schedule "A," attached to the agreement, is a plat showing the townships mentioned in the agreement and the dividing lines thereon as mentioned in said agreement.

Schedule "B" is a list of lands to be conveyed by the Iowa Falls and Sioux City Railroad Company to the Dubuque and Sioux City Railroad Company, lying east of said dividing line, mentioned in said agreement and marked on said plat Exhibit "A" aforesaid.

(To which defendants object as incompetent, immaterial, and irrelevant.)

THOS. A. HUGHES (called for plaintiff), sworn, says:

I am a farmer. I have been at Sioux City twelve years, and have known the land in question ten years. When I first knew it, seven or eight years ago, it was uninclosed. There was a part of it cultivated then, and it was fenced up afterwards for a pasture. I think Hedges commenced using the land about seven years ago; he first used it as a pasture, and the fence he built was very near the line. The fence joined Joy's fence on his land on the east side of the Floyd and run to the southeast corner of the quarter section, and from there to the bridge over the Floyd river, and this fence inclosed that part of the land in suit east of the Floyd river, about 100 acres. I think Hedges used it about four years before I commenced to use it, in spring of 1882. I leased from Mr. Hedges in 1882. I repaired the fence and moved my stock in. I plowed up one corner of it; about eighteen acres of it had been plowed before. I put a fence around this plowed part and used the balance for a pasture, and proceeded to raise corn,

&c., on the other part. I occupied it all that year and raised
97 a good crop. I cultivated it the next year under a lease from Hedges, and put a crop in there; this was in 1883; and had it all under way and a good crop until about June 13th. I had potatoes, corn, onions, tomatoes, and everything pertaining to a vegetable garden. I had been using the balance as a pasture, and had my stock in there. I used it as a pasture also in 1882. I was in no manner interfered with in my use of it in 1882. In September, 1882, Tredway wanted me to take a lease of him; before that no one ever interfered with me or said anything to me, and I did not regard this as interference. While I was putting in my crop in 1882 no one interfered with me, and no interference occurred until about June 13, 1883, when O. C. Tredway came to my house and tried to induce me to go and take a lease, and if I did not something would happen; and then, about the 12th of June, Tredway commenced to put up a fence around the premises. I paid no attention to it till they got the fence clear around. I had some men at work in the garden; I took a horse and went down; I noticed O. C. Tredway and several others there, and I noticed a lot of cattle in there. I asked one of them if that was his stock, and he said yes; and he said he had leased the premises from Tredway. I told him I had possession and I wanted the cattle taken out, and Tredway told me to keep quiet. I was advised to turn the stock out, and went down with that intention, but seeing the force Tredway had I concluded not to, and he told me I better not. They kept the stock there by Tredway giving me to understand that it was not safe to drive it out. They next turned all my stock out; this was done by the defendant Charles Chamberlain, with several others. I then turned my stock in. The defendants then turned them out, and gave me to understand that I should not interfere. I went down to dig some of my potatoes; I found there a couple of fellows watching the fence, and would not let me go in; my wife went in to get some, and this is the last time they let any of us go in, and after
98 the injunction was served Tredway came down and cut my fence down and carried it away. I think this was after the injunction was served. He came down with a lease and wanted me to sign that "damn quick," and he had some men with him, and put my tools in the wagon and drove me and my stock and family away from the land, and Tredway gave orders not to let Hughes or any other damn crew in. I attempted to go there, when I saw cattle in my corn, and I was promptly knocked down with a club, and I gave it up.

I met Chamberlain there once when Boss Tredway was there. Chamberlain turned the stock in there after the injunction was served on him, and I met him there at that time. I attempted to keep my stock in there, and Chamberlain had three men in there trying to keep his stock there, and he struck me with a whip twice and the others drove the stock out. After the service of injunction I went in and turned their stock out and remained in possession until Saturday night, and Chamberlain and others came down and again turned their stock in and would not let me in, and they kept

their stock and others in there after that, and I did not attempt to use it afterwards. I remember of John Doss using this land before Hedges used it. He raised corn there, and part of the land was fenced then; he fenced in forty or fifty acres. I think he used it three years. There was no improvements on the land on the west side of the river when I first knew it.

Cross-examination:

I knew when the writ of injunction was served by what my counsel told me and from the actions of Mr. Tredway while on the premises, and I think the sheriff told me it was served on Friday or Saturday. After the injunction was served O. C. Tredway came down to see me, and came up to me in a threatening attitude, and I asked him how he felt after the injunction was served, and he said, "Hell injunction," and tried to get me to sign a lease. I think Hedges had used this land three or four years before I took them. I was by them almost daily. I knew that Hedges and Needham fed cattle in there and claimed to have possession. I never took a lease from Griffey and Chamberlain for 1883 for the land. I knew about Doss using part of this land because I lived on a farm on that side of the river and used to see him frequently cultivating the land.

99

Cross-examination:

I took a lease from Tredway latter part of 1882, about September. I had been cultivating this land up to that time and had a crop in under a lease from Hedges. I had about eight acres in crop and there had been no interference with my cultivation of it till Tredway demanded of me to take a lease in 1883.

(Defendants object to all of the testimony of this witness as incompetent, immaterial, and irrelevant.)

EUREKA HUGHES, sworn, says:

I recollect of my father (T. A. Hughes) cultivating a part of the land in suit—he commenced in 1882. I knew where his fence run. He cultivated the ground and had corn and vegetables in, and used some it as pasture, and he was cropping it in 1883 when the trouble came, which was along in June, and they then commenced to put a fence around the whole field and put their stock in the field that father was using. The fence that father had there was a wire fence; he had a fence between the pasture and the cultivated part. O. C. Tredway cut that fence down with an axe and carried it away. At that time my father had a crop growing on these premises and the stock that defendants put in there destroyed the crop. They turned our stock out of the pasture and would not let us go in to look after the crop, and one of the men knocked father down with a club. I was there when father and defendant Chamberlain had the trouble. We were trying to keep our stock in the pasture that they had turned out, and defendant Chamberlain hit my father twice with a whip, and this was before the crop was destroyed by their stock.

&c., on the other part. I occupied it all that year and raised
97 a good crop. I cultivated it the next year under a lease from Hedges, and put a crop in there; this was in 1883; and had it all under way and a good crop until about June 13th. I had potatoes, corn, onions, tomatoes, and everything pertaining to a vegetable garden. I had been using the balance as a pasture, and had my stock in there. I used it as a pasture also in 1882. I was in no manner interfered with in my use of it in 1882. In September, 1882, Tredway wanted me to take a lease of him; before that no one ever interfered with me or said anything to me, and I did not regard this as interference. While I was putting in my crop in 1882 no one interfered with me, and no interference occurred until about June 13, 1883, when O. C. Tredway came to my house and tried to induce me to go and take a lease, and if I did not something would happen; and then, about the 12th of June, Tredway commenced to put up a fence around the premises. I paid no attention to it till they got the fence clear around. I had some men at work in the garden; I took a horse and went down; I noticed O. C. Tredway and several others there, and I noticed a lot of cattle in there. I asked one of them if that was his stock, and he said yes; and he said he had leased the premises from Tredway. I told him I had possession and I wanted the cattle taken out, and Tredway told me to keep quiet. I was advised to turn the stock out, and went down with that intention, but seeing the force Tredway had I concluded not to, and he told me I better not. They kept the stock there by Tredway giving me to understand that it was not safe to drive it out. They next turned all my stock out; this was done by the defendant Charles Chamberlain, with several others. I then turned my stock in. The defendants then turned them out, and gave me to understand that I should not interfere. I went down to dig some of my potatoes; I found there a couple of fellows watching the fence, and would not let me go in; my wife went in to get some, and this is the last time they let any of us go in, and after
98 the injunction was served Tredway came down and cut my fence down and carried it away. I think this was after the injunction was served. He came down with a lease and wanted me to sign that "damn quick," and he had some men with him, and put my tools in the wagon and drove me and my stock and family away from the land, and Tredway gave orders not to let Hughes or any other damn crew in. I attempted to go there, when I saw cattle in my corn, and I was promptly knocked down with a club, and I gave it up.

I met Chamberlain there once when Boss Tredway was there. Chamberlain turned the stock in there after the injunction was served on him, and I met him there at that time. I attempted to keep my stock in there, and Chamberlain had three men in there trying to keep his stock there, and he struck me with a whip twice and the others drove the stock out. After the service of injunction I went in and turned their stock out and remained in possession until Saturday night, and Chamberlain and others came down and again turned their stock in and would not let me in, and they kept

their stock and others in there after that, and I did not attempt to use it afterwards. I remember of John Doss using this land before Hedges used it. He raised corn there, and part of the land was fenced then; he fenced in forty or fifty acres. I think he used it three years. There was no improvements on the land on the west side of the river when I first knew it.

Cross-examination:

I knew when the writ of injunction was served by what my counsel told me and from the actions of Mr. Tredway while on the premises, and I think the sheriff told me it was served on Friday or Saturday. After the injunction was served O. C. Tredway came down to see me, and came up to me in a threatening attitude, and I asked him how he felt after the injunction was served, and he said, "Hell injunction," and tried to get me to sign a lease. I think Hedges had used this land three or four years before I took them. I was by them almost daily. I knew that Hedges and Needham fed cattle in there and claimed to have possession. I never
99 took a lease from Griffey and Chamberlain for 1883 for the land. I knew about Doss using part of this land because I lived on a farm on that side of the river and used to see him frequently cultivating the land.

Cross-examination:

I took a lease from Tredway latter part of 1882, about September. I had been cultivating this land up to that time and had a crop in under a lease from Hedges. I had about eight acres in crop and there had been no interference with my cultivation of it till Tredway demanded of me to take a lease in 1883.

(Defendants object to all of the testimony of this witness as incompetent, immaterial, and irrelevant.)

EUREKA HUGHES, sworn, says:

I recollect of my father (T. A. Hughes) cultivating a part of the land in suit—he commenced in 1882. I knew where his fence run. He cultivated the ground and had corn and vegetables in, and used some it as pasture, and he was cropping it in 1883 when the trouble came, which was along in June, and they then commenced to put a fence around the whole field and put their stock in the field that father was using. The fence that father had there was a wire fence; he had a fence between the pasture and the cultivated part. O. C. Tredway cut that fence down with an axe and carried it away. At that time my father had a crop growing on these premises and the stock that defendants put in there destroyed the crop. They turned our stock out of the pasture and would not let us go in to look after the crop, and one of the men knocked father down with a club. I was there when father and defendant Chamberlain had the trouble. We were trying to keep our stock in the pasture that they had turned out, and defendant Chamberlain hit my father twice with a whip, and this was before the crop was destroyed by their stock.

My father had corn, potatoes, and other vegetables in there. During 1882 my father was in no manner interfered with in his use of this land.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

100 S. T. DAVIS (called for plaintiff), sworn, says:

I reside in Sioux City, and have since 1856; most of the time practicing law; at one time a register of United States land office at Sioux City, and also in real estate business. I was register of land office in 1863–'4. I resided in Sioux City in 1856. I have an indistinct recollection of the survey from here in 1856 of the Dubuque and Pacific railroad; of part of it—this end of it. They commenced here at Sioux City and run east up the Floyd valley, across the land in controversy. I have seen their stakes as they went along up the Floyd valley. I don't remember whether I saw the stakes on the land or not. The surveyors left Sioux City surveying out the line in early part of July, 1856. I think it was July 5, 1856. I think they were here on the 4th and started out next day. I cannot say just when I saw the stakes, but have a general knowledge of the line they run up the Floyd. Sioux City was then a small town. The fact of the surveyors starting this line was a matter of common notoriety; we were a small town, and this survey was a matter of great importance to us and it was generally talked all over town. The railroad was afterwards constructed up the Floyd valley, on what I suppose was the line run. I think, possibly, when the line was fully constructed, at this end it might have been laid a little further west than the survey, not over half a mile from the first survey.

There was but one survey made in 1856 that I remember of. I suppose there was some improvement on this land in 1857 and 1858, but don't know.

I recollect of John Doss farming on part of this land. I think it was after I left the land office, in 1865. I cannot say whether Thos. L. Griffey was living in Nebraska in 1858 and 1859 or not, but in subsequent years he has been living there.

Cross-examination:

I had nothing to do with the survey party in 1856 except as a citizen of Sioux City. I only know whose service the surveyors were in by common report. When they came to construct
101 the road and locate the grading stakes I think this end of the line was a little further west than first survey of 1856, but I am not sure that there was any change whatever from the original survey of 1856.

THOMAS A. HUGHES (recalled for plaintiff) says:

When I first knew the land in question John Doss was occupying it and a part of it was cultivated. He had run a fence across from

adjoining land to bend of river and cultivated that portion in the bend. I think he was there when I came to Sioux City.

(Defendant- objects as incompetent, immaterial, and irrelevant.)

JOHN DOSS (called for plaintiff) sworn, says:

I live in Sioux City and have since May, 1858. I am a laborer and I have also farmed some. I know the land in suit. I cultivated part of it once. I commenced cultivating it, as near as I can tell, in 1861. I first started on a little piece just across from the mill dam. I fenced in a piece in the bend of the river. I cultivated it and worked on it from 1861 to 1877. I raised different things. I raised potatoes, corn, and garden stuff.

After I put up the first fence I built another fence further out and broke up the large piece. I could not tell how many acres I cultivated exactly—probably ten or twelve acres. Chris. Doss helped me some. How I come to be there was I asked folks who owned the ground and they said it was railroad land, and I fenced some of it and broke a little. I spoke to Mr. Joy about being there and he told me to go on and use it till the railroad wanted it. I got permission from others to use it. The railroad agent wanted me to pay $45 and I did pay $45 and leased it for three years' time from him, and then I found he had no right to take the money and some one told me and I kept it three years' time, and then they wanted me to pay and I took my fence down. I paid $45 to the man that wrote for me, and he sent it to the company and I got the receipt for it. I had a three years' lease at $45 a year and I paid the
102 $45 for first year. I think Hedges fenced the land next year after I left it. I took my fence off in 1877 and saw Hedges fencing it the next spring. The time I got lease from the company I applied to Wilgocki to write to the company for me, and he got an answer from the company, and after answer was received I worked right along on the land. I worked it for three years under this lease. The lease came right away after Wilgocki wrote. Wilgocki took me to some officer of the company that was here and he let me have it for $45 instead of $50, and I paid it to Wilgocki, and he sent it to the company and I got the receipt. When I first commenced to cultivate this land there was no improvements on it. I spoke to Mr. Joy a couple of times about using this land; he told me to stay till the railroad wanted the land. There were no improvements at all on this land on the south side of the Floyd when I first knew it. At the time I removed my improvements off in 1877 Witcher had a butcher-house on it.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

Cross-examination:

I don't know the boundary lines of this land. I was told it joined Joy's land on the north and east. I did not see any improvements on it when I went on it. There were no improvements on

this piece that I farmed when I went there and I saw none on this quarter section.

I do not know where the south and west line of this land was, and I know that the people said it joined Joy's on east and north. I went on this land in 1861 on my own account and cultivated a little piece in 1861. I applied to the railroad company for a lease through Wilgocki in 1874. I talked to Mr. Joy about it before that. I have seen the wire fence that has since been put around the quarter section. When I went on this land in 1861 there were no improvements within the territory now inside of the wire fence that I could see and I was past it and over it often. I could see the whole piece from where I lived. The land on the north side
103 of the Floyd river had no improvements on it when I went there in 1861.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

THOMAS J. STONE (called for plaintiff), sworn, says:

I am a banker. In 1856 and 1857 I was in real estate and surveying business, and lived at Sioux City. I commenced living in Sioux City in May, 1856. I was living there when the engineers of the Dubuque and Pacific railroad run their line. I knew when they were here. A set of engineers came here and commenced at the lower end of the town and ran a line up the Floyd valley in July, 1856. I think they started July 5, 1856. I followed their survey shortly afterwards as far as Cherokee; about 45 miles. They staked a line in the ordinary way that preliminary surveys are made in a hasty manner. I did not see many stakes in the city, but it was plainly marked as soon as you got out on the prairie, clear to the Little Sioux. The survey was a matter fully talked over at the time by the people of Sioux City. Everybody talked more or less about it. There were but few people here then, and the survey was a matter of public notoriety. I don't recollect of any other survey up the Floyd river until the St. Paul survey was run. I have noticed the line of the railroad as constructed by the Iowa Falls and Sioux City railroad. Its general course and direction is about the same as the original survey; along the lower part of the Floyd valley, two or three miles from Sioux City, the constructed line is a little west of the survey; probably twenty rods. I had occasion to examine this surveyed line because I made some selections, and I was quite familiar with the line.

Cross-examination:

I was not connected with the engineer corps that made this survey. I only knew who they were by report. I had a desire to know where the line was up the Floyd valley, as I was making myself familiar with lands and what would make them valuable.
When they made the first location for the road in Sioux City
104 they paid no attention to original survey, except to make the location in a general way near it; along up the Floyd it

was not far from the original survey. The line run in 1856 was considered by locators as a preliminary survey. The road is substantially built on the line of the original survey, and for fifteen or twenty miles up the Floyd the road is constructed near the original survey. All roads have a preliminary survey. I don't know how the company considers the original survey. I got my information as to the line of the road by following the stakes of the surveys, and in different ways.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

G. W. NEEDHAM (called for plaintiff), sworn, says:

I reside in Sioux City, and have for 15 years. I know the land in question, and have for 14 years. I know where Hedges' mill is situated. In the fall of 1875 I bought an interest in it. When I first knew the land there was a house on it called the Pritchard house, near west line of track and about one hundred rods from southwest corner. There was another house on the portion south of the Floyd at that time. There was a small house put up near the southwest corner when I went into the mill in 1875, and in 1876 a man by the name of Johnson moved a house on near the Pritchard house, and in spring of 1877 Mr. Kiteler put a house on there. These houses faced the street running on the west side of this land, and from three to seven rods away. When I first became acquainted with this land the portion lying north of Floyd river—and east—had a small field of corn in it. The party who had this crop in continued to cultivate it till 1877, and Hedges used a portion of it in 1879 lying on the northeast side of the Floyd. A portion we fenced that year and used it as a pasture, and sowed rye on it as a pasture. Hedges and I used it, and he leased it of John Pierce. I went out of the mill business in 1880. I think Hedges and I had fifty or sixty acres of this tract enclosed, and there
105 was a fence between the tract and Joy's land on the north. The land on the east side of the Floyd was all enclosed in 1882. The land was enclosed with a fence in 1881, the same as when I was interested with Hedges.

Cross-examination:

I know where the east line of the quarter section is as given us by the surveyors. I don't know anything personally of the east line. I only know where the south line is from the running of the streets. On the south line I always supposed there was a road running to the bridge across the Floyd.

Redirect:

There has been a fence built along the east side of the tract and on the south side along the highway. The fence built in 1882 along the east line was constructed about fifty rods from where first fence I spoke of was built.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

CHRIS. Doss (called for plaintiff), sworn, says:

I came to Sioux City in spring of 1857, and am a brother of John Doss. I know John Doss fenced a piece of land of the tract in question the other side of the Floyd. I think he commenced it in 1861. He fenced this tract and plowed it up and planted it. I think he went along every year and cultivated it. I cannot tell how long he occupied it. When I first knew the land there was nothing on it.

E. TODD (called for plaintiff), sworn, says:

I am a resident of Sioux City, and have been since 1861. I know the tract of land in question. I know where the fence now is on the east side of this tract and on the south line. There is a street on the south side of the tract. It runs parallel with the tract, and Clarke street is on the west side of the tract. Clarke street is in Sioux City, east addition. I first became acquainted with the land in 1870. I was living then near it, about half a block west
106 of Clarke street. The land in question was in plain view from my place. In 1870 John Doss had a field on this land in question, and plowed it. I moved away from there in 1875, and I think he was using it then and after. I think he used it continuously from 1870 to 1875. He raised corn and vegetables each year, I think. I know afterwards Hedges fenced it and used it for pasturage. In 1870 Mr. Dally had just finished a house on this land south of the Floyd river. He was working for the railroad—building a depot, I was informed. He used railroad lumber. I think he moved into the house in 1870 and moved away in 1871, and during this time he was working for the railroad company around the depot. Pritchard lived in this house awhile and moved it away. He moved into it a year or two after Dally left it. In the meantime it was empty. This house was on the land in suit and near Hedges' mill. There was no other house on this land at that time. The next house on the land was built in a year or two. There was one built south of the Floyd, some ways from the street. It was moved out on the street afterwards. I could not tell when the next house was built. They began to settle in there afterwards, but I could not tell the exact time when. It was when several houses were moved back from the caving in of the Missouri river. There was then no enclosures on this land south of the Floyd, except as each man put a fence around his own land. It was about nine years ago that I moved these houses on there. The wire fence was put around this tract along Seventh street in spring of 1883. There was a fence on the east side before this one that was built in 1883. This first fence and the river enclosed all of this tract east and north of the Floyd. While Hedges was using it I saw his cattle in there, and he used it for stock yard and pasture. The line of the Iowa Falls and Sioux City railroad runs half a block west of this tract.

(Defendant- objects to this testimony as incompetent, immaterial, and irrelevant.)

Cross-examination:

107 There is a highway on the south side of this tract, which is an extension of Seventh street. When I moved Pritchard's house off of this land I moved it to Fourth and Clarke streets. This was seven or eight years ago. I know Doss was cultivating a part of this land in 1870, because I moved near there that year. I saw this man Dally working for the railroad company and on their buildings, and he had the superintending of their work, and he built the depot of the railroad company. I saw Doss first using this land in 1870, and I saw him using it last in 1874. I moved away in 1875. I saw him working there in 1874 and in 1873. I never saw the lines of this quarter section surveyed. I only know the lines by the road and fences.

Redirect examination:

Mr. Dally referred to superintended the carpenter work for the railroad company building, the freight depot, of the Iowa Falls and Sioux City Railroad Company. This freight depot was about two hundred feet from the tract in question; and while he was working there his family lived in this house on this land.

Plaintiff offers in evidence as Exhibit "38" map of location of the Dubuque and Pacific Railroad Company, with the certificates and endorsements thereon (but owing to the nature and extent of the same it cannot be set out in the transcript).

(Objected to by defendant- as incompetent, immaterial, and irrelevant and not properly certified.)

D. McDONALD (called for plaintiff), sworn, says:

I am sheriff of Woodbury county and have been for four years. I served a writ of injunction in the case of I. F. & S. C. R. R. Co. *vs.* Thos. L. Griffey on June 29, 1883, as shown by my books. I don't know where the writ now is.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

ANDREW PARMLEE, sworn, says:

I know the land in dispute and where the fences are around it as now constructed. I lived on the land in 1881, near the
108 middle of it, east and west. There is a road running on the south side of the tract. I was advised to go on the land. I saw Mr. Joy, and he told me he thought the railroad company would lease it to me, and I went on and have remained there ever since.

Plaintiff offers in evidence certified copy of letter from Thomas A. Hendricks, Commissioner, to register and receiver, Sioux City, dated July 7, 1857:

GENERAL LAND OFFICE, *July* 7, 1857.

GENTLEMEN: Pre-emption locations * * * No. 53493 of northwest quarter 27, 89, 47, of Thomas L. Griffey have this day been cancelled, for the reason that the lands claimed *was* not at the date of the respective settlements by pre-emption, viz., 18th and 19th of July, 1856, subject to pre-emption. The land claimed is within the six-mile limits of the Dubuque and Pacific railroad and was subject to pre-emption under the act of May 15, 1856, making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State up to the time when the route of said road was definitely fixed. It appears from the map of said road on file in this office that part of said road within the limits of which this land is situated was located or definitely fixed on the 5th day of July, 1856, twelve and thirteen days prior to the respective dates of settlement by pre-emption.

The warrants (act of 1855) are herewith returned to the respective parties on the surrender of their duplicate certificates of location.

You will be pleased to notify Mr. Griffey to make the usual application through your office for the return of his purchase-money on excess receipt No. 438.

Be pleased to note the cancellation on your books and plats.

THOS. A. HENDRICKS,
Commissioner.

Register and receiver, Sioux City.

(*Certificate Attached.*)

Consolidated land office.

DES MOINES, IOWA, *Oct.* 30, 1885.

I, F. G. Clarke, register of said United States land office,
109 hereby certify the above and foregoing is a true and correct copy of a letter on file in this office dated July 7, 1857, which said letters forms a part of the records and archives of said office, late records of Sioux City United States land office, now consolidated with the Des Moines United States land office.

Given under my hand October 30, 1885.

F. G. CLARKE,
Register of the U. S. Land Office at Des Moines, Ia.

(Objected to by defendants as incompetent, immaterial, and irrelevant.)

WM. L. JOY (called for plaintiff), sworn, says:

I am an attorney-at-law; reside at Sioux City, and have been practicing law there since 1857. I am one of plaintiff's attorneys. I have been attorney for the plaintiff and the Iowa Falls and Sioux City Railroad Company in relation to the land granted to said company for building a railroad from Dubuque to Sioux City. The firm of which I am a member commenced for the Iowa Falls and Sioux City Railroad Company looking after their interest in the land grant in 1868 or '69, and prior thereto had done some business

with reference to the land grant of the Dubuque and Pacific railroad.

The Iowa Falls and Sioux City Railroad Company succeeded to the right of the Dubuque and Sioux City Railroad Company, formerly the Dubuque and Pacific Railroad Company. I know the land in controversy, and have since 1857.

Some time in 1861 John Doss commenced cultivating and improving a portion of this land. He fenced across the river bend, enclosing a portion lying upon the north and east side of the Floyd, and he put in a crop there for several years continuously. After a time he extended his field so he took in a much larger tract and broke up a piece on it directly south of section 22, which I then had an interest in, and when he extended the field he built a fence further toward the east side of this quarter. Doss continued to cultivate this field until it was rented to Hedges. Hedges & Needham occupied this tract north and east of the Floyd and used it
110 for stock mainly. Mr. Hedges built the fence out by the highway upon east side and down on south side to the Floyd river, enclosing all of this land east and north of the Floyd. He used it as a pasture field, and then sublet to Mr. Hughes, who used it as a garden and a pasture in 1882 and 1883. Hughes built a fence between that part used as a pasture and a garden. When I first knew this land I cannot recall any improvements on it. It remained vacant for a good many years, until about the time the Iowa Falls and Sioux City railroad was built through to Sioux City, in 1870, and at that time a house was built on the west side of this tract. There was some trouble between the party who afterwards claimed this house and the railroad company. The company claimed the house was theirs, as they furnished the lumber and it was their property, and the party who bought it claimed it was theirs.

In 1868 some time some of the officers of the Iowa Falls and Sioux City Railroad Company were here, and among others John I. Blair, president of the road, and he noticed some one was occupying and cultivating a portion of the tract and had fenced it. I told him John Doss had been occupying it for some years, and he wanted to know how he was occupying it, and I told him what I knew about it; that Doss went on and took possession and was occupying it as a piece of railroad land. I spoke to him about allowing Doss to remain there, as he had made some improvements, and he told me I could notify Doss to remain there till the company wanted to use it. I saw Doss and so notified him. I had a talk with Doss about remaining on the land. He said he had some improvements there and wanted to stay, and I told him he could, and he remained and cultivated it until 1879, I think.

Hedges & Needham occupied this land under a lease from plaintiff, made by its president, and it was renewed by me for the company by authority of the president of plaintiff. The last renewal was one year from March, 1883.

There was no interference with the possession of this land by
111 plaintiff from the time Doss commenced to use and cultivate it by any other parties until in 1883, when some of the de-

fendants in this action interfered. This was in June, 1883. Acting for plaintiff in this action, when I learned with regard to such interference I went down and forbid their erecting any fence on the land and interfering in any way with the possession of plaintiff. This was before this action was commenced. I found some men at work building a fence when I first went there and forbid their constructing the fence or in any way interfering with plaintiff's possession. I went again and found O. C. Tredway there and likewise forbid him. There had been no improvements made on this land to my knowledge prior to the time John Doss went into possession. Soon after the land in question was patented to the railroad company I saw Hall and Vandeventer, and they were inquiring if Doss was still in possession, and I informed them he was. They then told me to see him and make some arrangements for his remaining there. I did so, and told him the plaintiff had acquired the title, and that he could remain the same as he had before on the land until such time as the company desired to use it, and under that arrangement Doss remained there till he moved his fence off, which was about the time Hedges took it. Mr. Vandeventer was at that time president and Mr. Hall an officer of plaintiff.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

J. H. BOLTON (called for plaintiff), sworn, says:

I am clerk of this court, and have possession of the records thereof. I have made careful search of the records and do not find the writ of injunction issued in this case.

The records show the writ issued on June 30, 1883, and was issued on the order made by the judge on the petition.

(Defendants object to this testimony as incompetent, immaterial, and irrelevant.)

W. L. JOY (recalled) says:

112 The house I spoke of as being built on the west side of this tract about the time the railroad was constructed into Sioux City was built in 1870, I think—the year they built the depot. It was before plaintiff got the title to the land.

(Defendants object as last above.)

Plaintiff offers in evidence as Exhibit "40" the record of the patent for the land in controversy from the State of Iowa to the Iowa Falls and Sioux City Railroad Company, the original patent being heretofore introduced as Exhibit "22" (page 77 of ab.), which shows the patent from the State to said railroad company, dated July 5, 1871, duly executed and recorded in the office of the recorder of deeds of Woodbury county August 25, 1871.

Plaintiff offers in evidence as Exhibit "41" the original writ of injunction issued in this case on June 29, 1883, as prayed in the petition and return of service thereof, showing the same was served

on the defendants Charles Chamberlain and O. C. Tredway and their agents by the sheriff of said county July 2, 1883, in Woodbury county, Iowa.

Plaintiff offers in evidence as Exhibit "A 1" duly certified copy of letter dated March 3, 1857, from Commissioner of General Land Office to Secretary of Interior, viz:

GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1857.

Hon. R. McClellan, Secretary Interior.

SIR: With a view to give effect to Attorney General Cushing's opinion of the 16th February, 1857, respecting the Iowa railroad grant by act of May 15, 1856, the enclosed circular has been prepared, which is respectfully submitted for your consideration and is enclosed for your approval.

THOMAS A. HENDRICKS.

Duly certified to by Wm. A. Sparks, Commissioner of General Land Office, to be a true copy November 3, 1885.

(Objected to by defendants as incompetent, immaterial, and irrelevant.)

Plaintiff offers in evidence as Exhibit "A 2" certified copy of opinion of Attorney General of United States under date of Feb. 16, 1857:

113 ATTORNEY GENERAL'S OFFICE, 16*th Feb.*, 1857.

SIR: I have duly considered the further question presented by your letter of the 4th on the construction of the act granting alternate sections of public lands for the use of railroads in the State of Iowa. (XI Stat. at Large, p. 9.)

By previous communication you had submitted to me the question "whether the said act is a grant *in præsenti* of the alternate sections within the six-mile limits of the several roads or whether such grant does not await the period when the lines or routes of said road are 'definitely fixed' before it attaches to any particular land." I replied that, in my opinion, "the act by its text makes a conditional grant *in præsenti* in the nature of a float, and which does not attach to any particular parcel of the public land until the necessary determinative lines shall have been fixed on the face of the earth." (See opinion of December 19, 1856.)

Neither the inquiry made by you nor the course of my argument in reasoning out a response thereto called for consideration of the question at what moment of time it is to be understood "that the lines or routes of said roads are definitely fixed," to use the language of this act, or in that of my opinion, "fixed on the face of the earth." That is the question which now arises and which you refer to me for determination.

The commissioner of public lands conceived that the grant attaches to the exclusion of interfering purchasers at the date of the filing of the authenticated plats at the local land office and not

before. The State of Iowa, on the other hand, alleges that the actual location of the routes, as distinguished from the platting of the same and filing of the plats *on* the local land office or elsewhere, is the date of the rights of the State.

You suggest that you incline to the opinion "that a mere survey upon the ground is not sufficient to establish the line of the road." I think so, too. The lines must be "definitely fixed." A mere survey fixes nothing, either contingently or exclusively, in this respect. It is means of information; it is not location. I go further
114 and say that "definitely fixed" implies fixed without capacity of change. Thus, excluding from consideration at present the question of what is fixedness and assuming that some act has been performed which is on both sides admitted to be fixedness, whether location *de facto* only or platting and report, it seems to me that any change in the line of route unfixes what had thus been fixed, takes away from it the quality of definiteness, reopens the land to competing purchasers, and postpones to a future act of fixedness the commencement of the exclusive right of the State.

But the question returns: What is definite fixedness, in your view or in mine, as applied to the railroad routes of this act? In several anterior acts of same nature it is required that a correct plat of the proposed road shall be forwarded to the proper local land office, and also to the General Land Office (*ex gratia* IX Stat. at Large, p. 466; X Stat. at Large, p. 8; *ib.*, p-. 28 and 155). The Commissioner infers that although the present act does not contain express provision to this effect, still a plat of the routes must be communicated to the Government. I think he is correct in this, and that such is the duty of the State. Does it follow that the rights of the State do not attach until this report shall have been made?

Or do those rights attach at the moment when the act is consummated, which the filing of the plats reports to the Government? I think that an attentive consideration of the nature of the two things and a comparison of them with acts of the same nature in other branches of the public service, and more especially in the case of pre-emptors, the class of purchasers who compete with the State, will put us in the way of satisfactorily deciding the point in controversy.

The State of Iowa has a title in virtue of the law to certain alternate sections, but the question of what particular sections depend on acts to be performed by the State or by the railroad companies who take in the interest of the State. When the routes are definitely fixed, then it becomes apparent which particular sections go to the State. They belong to the State in virtue of the
115 law, not in virtue of the definite fixedness of the routes. The law gave the land by grant *in præsenti*. The definite determination of the routes does not give the land, but only determines what land, which thereupon is the land of the State. When thus vested it is held not by patent, but by statute. Now, what determines that a railroad route is definitely fixed? Is not that a thing which comes according to circumstances? Thus the legislative act granting a railroad may proceed in the interest of the landholders,

through whose land the road is to pass, to fix its place definitely, by such words of description as produce the result of absolute certainty of metes and bounds.

Or the act not proceeding to this length may commit selection of routes to the railroad company, and when the company may itself locate by descriptive words or by plans of survey so precise that the land which it takes from the proprietor and the land which it leaves to him are thus capable of being distinguished with absolute certainty, or it may begin by marking out the route on earth with metes and bounds, and so fix to the eye that which it appropriates for the use of the road and of which it therefore becomes possessed in right of legal appropriation.

In the latter case is it necessary, in order to consummate the expropriation and new appropriation, that a plat should be drawn up and filed in some public place? I think not, unless that be expressly required by the statute as the condition of the charge of the property. If not so expressly required as condition of title, such fil ng of plat anywhere is but matter of notice.

If the location of the road be on paper only, then the plat is a necessity of notice. But if the route has been actually marked on the earth, then the plat is but written authorization or evidence of that fact, and the filing of the plat is nothing but information or notice of what has been previously done.

The subject of controversy, it is true, in the present inquiry, is not of the land on which the road is located, but land by the
116 side of it dependent on the location. Still, the question what is definite location is one and the same as to secondary as well as primary consequences.

Supposing the line of the road to be thus marked on the earth, it is fixed, then, at least in one of the ways in which such a thing is capable of being fixed. So it would be if, instead of being marked on the earth, it were platted or otherwise located by official act on paper.

But is it even then definitely fixed? That is a point in the present case not so clear at first sight, for there is nothing in the acts to decide whether or not the State (or the companies for it) can or not withdraw a plat filed and file a new one representing a change of location.

I suppose the laws of the State may, perhaps, contain provisions on this point. If they do not, there might be doubt as to it under the general terms of the act of Congress. (Hudson, etc., Canal Co. *vs.* N. Y. & E. R. R., IX Paig's R., 322.)

But we do not need to pause on this question, still less to take it up collaterally and in advance, for no danger of any wanton delay on the part of the State to make its locations definitive exists in the present case; since until then the public lands on any one of the proposed routes are subject to sale by the United States and every act of sale diminishes *pro tanto* the field of selection open to the State.

That, indeed, is the very subject of dispute here. The State desires to hasten as much as possible the moment when the routes

may be regarded as definitely fixed in order to save the lands from being taken up by private pre-emptors. I think we may deduce from this fact a rule applicable to the existing difficulty.

The pre-emptor acquires inchoate or incipient title by entering on the land and then performing certain acts by means of which the land is visibly appropriated to an individual use and thus segregated in fact from the public domains. If, in addition to these acts on the land, the pre-emptor afterwards performs certain acts of notice and proof in the local land office, then his previous
117 equitable right is converted into a legal one, and the land selected by him comes to be segregated from the public domain in law. If, discontented with his first location, he makes another, of course he loses all rights under the first, whether as respects conflicting purchasers or as respects the United States. Why should not the State of Iowa have similar rights in the present case? I cannot see why pre-emptors should have exclusive power to make title by acts *in pais*. It seems to me that the stakes and stones set, or other marks made by the State, are just as good notice to all the world as the stakes and stones set or other marks made by the pre-emptors. I know it is common to regard pre-emptors as a forward class, but their privileges must not be pushed to excess. Other people have rights as well as they. The competition here, as all the facts indicate, and as indeed your communication expressly declares, is between the State on the one hand and the "speculative or fraudulent pre-emptors" on the other. I think quite enough is conceded to such pre-emptors, if they be suffered to enjoy equality of right with the State in that respect. Certainly there is no good reason why they should enjoy superior right, and be allowed to commence titles by sticking a stake into the earth, while the same advantage is denied to the State. If, on the premises of the assumption that no rights of the State attach until plats are prepared and filed, speculative pre-emptors may follow the agents of the State, step and step, and squat on the land, as the lines of road are surveyed and marked, and so anticipate all the railroad selections, the effect will be to defeat the beneficial purposes of the acts of Congress.

For all these reasons my conclusion is that by surveying and marking the lines on the ground those lines are definitely fixed in so far as regards the present subject-matter—that is, to give to the State an equitable or inchoate title to the dependent lands equal in right, at least, to that which any pre-emptor gains by commencing actual settlement; that the State may lose this inchoate right by change of location just as a pre-emptor will his by change of
118 settlement; that the State perfects its inchoate title by filing the plats in the land office, as the pre-emptor does his by correspondent act; and thus equal justice will be administered to all parties, the State, the pre-emptor, and the United States.

C. CUSHING.

To Hon. Secretary of Interior.

This is duly certified as a true copy from the official records by Wm. A. J. Sparks, Commissioner, 4th Nov., 1875.

(Objected to by defendant as incompetent, immaterial, and irrelevant.

Plaintiff offers and introduces in evidence, as Exhibit "A 3," a duly certified copy of section of the map of the Dubuque and Pacific, now the Iowa Falls and Sioux City railroad, with the certificates thereto attached, filed in Department of Interior Oct. 13, 1856 (but owing to nature and extent of which cannot be set out in abstract, but will be found in transcript as Exhibit "A 3," with the certificates thereto attached).

(Defendants object as incompetent, immaterial, and irrelevant.)

Plaintiff offers and introduces in evidence, as Exhibit "A 4," duly certified copy of map of the Dubuque and Pacific Railroad Company, filed in office of secretary of state of Iowa Oct. 2, 1856, with the endorsement and certificate thereon, the same being the same as Exhibit "40," heretofore introduced in evidence, with additional certificates attached (but owing to nature and extent of which same cannot be set out in abstract, but will be found with certificates and endorsements attached to transcript as Exhibit "A 4").

(Defendants object as incompetent, immaterial, and irrelevant.)

Plaintiff offers in evidence as Exhibit "1000" a duly certified copy of record of acceptance of the grant from the State of Iowa to the Dubuque and Pacific Railroad Company, viz:

119 *Acceptance of the Land Grant by the Dubuque and Pacific Railroad Company.*

Office of the Dubuque and Sioux City Railroad Co.,

DUBUQUE, *July* 7, 1856.

At a meeting of the board of directors of the company held this day the following resolutions were unanimously adopted:

Resolved, That the Dubuque and Pacific Railroad Company hereby assents to and accepts the provisions of an act enacted by the General Assembly of the State of Iowa and approved July, 1856, entitled An act to accept the grant to carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15, 1856.

Resolved, That the president and secretary of the Dubuque and Pacific Railroad Company be, and they are hereby, required to affix their signatures to the above resolution and have the same filed in the office of the secretary of state of Iowa forthwith.

[SEAL.] J. P. FARLEY, *President.*

Attest: H. P. LEACH,
Secretary of D. & P. R. Co.

Duly certified to by Frank Jackson, secretary of state of Iowa, under his hand and seal of office, March 6, 1886, as a true and cor-

rect copy of the acceptance of the land grant by the Dubuque and Pacific Railroad Company as appears on the records of his office.

(Defendants object as incompetent, immaterial, and irrelevant.)

Defendants' Testimony.

Defendants offer and introduce in evidence, as Exhibit "1," certified copy from the records of the land office at Des Moines, formerly the Sioux City land office, abstract of declaratory statement of Thomas L. Griffey on land in controversy, viz:

120 Abstract of declaratory statements filed in the land office at Sioux City during the month of ——, 1885, on lands which have not been offered at public sale under the President's proclamation.

No. of statement filed.	Date of settlement.	Date when filed.	Name.	Description.	Sec.	T'p.	Range.	Remarks.
*	1856.	1856.		*	*	*	*	
263	July 19	July 19	Thos. L. Griffey-------	N. W. ¼ ---	27	89	47	
*	*	*	*	*	*	*	*	

Certified by F. G. Clarke, register of consolidated United States land office at Des Moines, Iowa, July 5, 1883, having the care, custody, etc., of said office, as a true copy of an entry found in Sioux City declaratory statement record, kept on file in that office, in so far as it relates to the filing declaratory statement No. 263 in name of Thomas L. Griffey, claiming northwest quarter 27, 89, 47, filed July 19, 1856, alleging settlement same day and year.

(Objected to by plaintiff as incompetent, immaterial, and not properly certified.)

121 Defendants offer and introduce in evidence as Exhibit "2," from consolidated land office at Des Moines, showing entry of northwest 27, 89, 47 to Thomas L. Griffey September 5, 1856, viz:

Township 89, range 47, district of Sioux City.

Description of tract.				Contents.		Rate per acre.		Purchase-money.	
Parts of sec.	Sec.	T'p.	R'e.	Ac.	100ths.	Dollars.	Cents.	Dollars.	Cents.
N. W. ¼ ----------	27	89	47	160	Located 5th September, 1856, by				

Township 89, range 47, district of Sioux City—Continued.

Name of the purchaser.	Date of sale.	No. of receipt and certificate of purchase.
Thomas L. Griffey, ass. under M. B. L. w't No. 53493, act of 1855.		

(Certified as follows:)

CONSOLIDATED U. S. LAND OFFICE, DES MOINES, IOWA.

I, F. G. Clarke, register of the United States land office at Des Moines, hereby certify the above is a true and correct copy of an entry of the location of military bounty land warrant No. 53493, act 1855, covering northwest 27, 89, 47, as found in the tract book, a record kept on file in the office of late Sioux City United States land office.

F. G. CLARKE, *Register.*

Signed July 5, 1883.

(Objected to by plaintiff as incompetent, immaterial, and not properly certified.)

Defendant offers and introduces in evidence, as Exhibit "3," original patent from Government to Thomas L. Griffey for land in suit, dated June 30, 1882.

(Objected to by plaintiff as incompetent and immaterial.)

122 The patent so introduced in evidence is a patent signed by the President to Thomas L. Griffey for the land in suit, dated June 30, 1882, reciting the deposit of M. B. land warrant 53493 for 120 acres, under act of 1855, located on said tract, and excess paid and warrant assigned to said Griffey, in whose favor said tract has been located, and recorded July 7, 1882, in office of recorder of deeds, Woodbury county, Iowa, in Book W of Lands, p. 333, and entered in auditor's office for taxation the same day.

Defendant offers and introduces in evidence, as Exhibit "4," original deed from Thomas L. Griffey and wife to George W. Chamberlain for undivided half of land in controversy, made and acknowledged Jan. 31, 1857.

(Objected to by plaintiff as incompetent and immaterial.)

The deed is a warranty deed covenanting against the lawful claims of all persons claiming under grantors, except the United States Government, and is executed and acknowledged by Thomas L. Griffey and wife Jan. 30, 1857, to undivided half of land in controversy, endorsed: Recorded May 20, 1857, in Woodbury county, in Deed Record A, p. 413.

Defendant offers and introduces in evidence, as Exhibit "5," original deed from Thomas L. Griffey and wife to Curtis, Earle and Burdette for undivided quarter of undivided half of land.

(Objected to by plaintiff as incompetent and immaterial.)

The deed is a special warranty deed executed by Thomas L. Griffey and wife to W. W. Curtis, George Earle, and S. S. Burdette for undivided quarter of undivided half of land in suit, dated July 9, 1882, acknowledged Feb. 19, 1884, and recorded in Woodbury county recorder's office Nov. 9, 1885, in Book 28 of Lands, p. 321.

Defendants offer and introduce in evidence, as Exhibit "6," original deed from Charles Chamberlain to Curtis, Earle & Burdette for part of land in suit—(objected to by plaintiff as last above)—viz:

123 This deed is a special warranty deed from Charles Chamberlain (single) to W. W. Curtis, George Earle, and S. S. Burdette for undivided quarter of undivided half of land in suit, executed July 9, 1882, acknowledged February 20, 1884, and recorded in Woodbury county, Iowa, recorder's office November 7, 1885, in Book 28 of Land Records, p. 322.

Defendants offer and introduce in evidence as Exhibit "7" a deed from Charles Chamberlain to John M. Tredway for part of land in suit.

(Objected to as last above.)

The deed is a special warranty deed from Charles Chamberlain (single) to John M. Tredway for undivided quarter of undivided half of land in suit, dated July 9, 1883, acknowledged March 22, 1884, and never recorded.

Defendants offer and introduce in evidence as Exhibit "8" original deed from Thomas L. Griffey and wife to John M. Tredway for part of land in suit.

(Objected to by plaintiff as last above.)

This is a special warranty deed from Thomas L. Griffey and wife to John M. Tredway for undivided quarter of undivided half of land in suit, dated July 9, 1882, acknowledged February 19, 1884, and never recorded.

Defendants offer and introduce in evidence as Exhibit "9" chapter 26 of the Laws of the Twelfth General Assembly of Iowa.

(Objected to by plaintiff as incompetent, immaterial, and not properly certified.)

This is the act of the Legislative Assembly of Iowa, approved March 10, 1868, and took effect March 18, 1868, being "An act resuming certain rights conferred upon the Dubuque and Pacific (now Dubuque and Sioux City) Railroad Company by an act approved July 14, 1856, and acts amendatory thereof, and to repeal certain laws in relation thereto."

Defendants offer and introduce in evidence as Exhibit "10" sec. 27, art. 3, of the legislative department of the constitution of Iowa, adopted in 1846 (same objection as last above), viz:

(Sec. 27, art. 3, constitution of Iowa:)

124 "No law of the General Assembly of a public nature shall take effect until the same shall be published and circulated in the several counties of this State by authority. If the General

Assembly shall deem any law of immediate importance they may provide that the same shall take effect by publication in newspapers in the State."

Defendants offer and introduce in evidence as Exhibit "11" sections 20–24 of the Code of 1851.

(Objected to by plaintiff as last above.)

These sections provide (1) that acts of a private nature, when not otherwise expressly provided, take effect on the thirtieth day after they are approved by the Governor or otherwise become a law under the constitution; (2) acts which are to take effect by publication shall be published in two papers (one being at the seat of government), and take effect on the twentieth day after their last publication; (3) acts of a public nature must be printed, bound, and deposited in office of secretary of state by 1st of May following, and be distributed to all the organized counties of the State by 1st of June following; and such acts as have not taken effect before by virtue of other provisions of law shall take effect July 1 following, and every such act shall be presumed to have taken effect at the time unless the contrary appears, as provided by law; (4) in case the statutes are not distributed to all the organized counties in the State by July 1 the secretary of state shall make, sign, and file in his office a certificate stating on what day they were deposited in the last county, and shall take effect on the tenth day thereafter; (5) the acts and resolutions of the special sessions shall be published at such times and in such manner as the General Assembly shall direct, in conformity with the constitution.

Defendants offer and introduce in evidence as Exhibit "12" a duly certified copy of a letter from Commissioner to register and receiver at Sioux City, dated June 19, 1856, and received at Sioux City July 3, 1856 (to which plaintiff objects as last above), viz:

125 "GENERAL LAND OFFICE, *June* 19, 1856.

"Register and receiver, Sioux City:

"Instructions having been sent you from this office by telegraph on 10th ult. and by mail 15th ult. in reference to withdrawal from market of certain lands in your district, in pursuance of an act of Congress approved the 15th ult., making a grant of lands to the State to aid certain railroads, &c., &c., you are advised that settlements are authorized upon any of the lands thus withdrawn, and rights by pre-emption may be acquired as well to odd-numbered sections and within the six-mile limits of the line of railroad as to other lands so reserved. By first section of the act the United States can depose of by pre-emption any of the lands thus withdrawn up to the time when the line or route of said roads are definitely fixed. Then, and not until then, will the right of the State attach under the said act to all vacant lands in odd-numbered sections within six-mile limits. Acknowledge receipt hereof.

"THOS. A. HENDRICKS,
"*Commissioner.*"

Received July 3, 1856.

Defendants offer and introduce in evidence as Exhibit "13" duly certified copy of telegram from Commissioner to land office at Dubuque, dated Oct. 20, 1856, and received Oct. 31, 1856 (objected to as last above), viz:

"GENERAL LAND OFFICE, *Oct.* 20, 1856.

"Register and receiver:

"After receipt of this no pre-emptions are to be admitted within fifteen-mile limits of the recent railroad grants. Acknowledge by mail.

"HENDRICKS,
"*Commissioner.*"

Received Oct. 31, 1856.

Defendants offer and introduce in evidence as "Exhibit "14" duly certified copy of letter from Commissioner to Sioux City land office, dated Oct. 20, 1856; received at Sioux City Nov. 2, 1856 (objected to as last above), viz:

"OCT. 20, 1856.

"Register and receiver:

"As ordered by telegraph dispatch of this date, pre-emp-
126 tions are interdicted, after the receipt at your office of that dispatch, within fifteen-mile limits of railroad grant of May 15, 1856. Diagrams showing the exact limits and routes of road, now being laid down upon the maps in this office, will be forwarded to you as early as possible.

"HENDRICKS,
"*Commissioner.*"

Received Nov. 2, 1856.

Defendants offer and introduce in evidence as Exhibit "15" a duly certified copy of letter from General Land Office to register and receiver at Sioux City, dated Oct. 22, 1856; received Nov. 14, 1856 (objected to as above), viz:

"OCTOBER 22, 1856.

"Register and receiver, Sioux City:

"Upon filing in your office of the duly certified map of the line or route, as definitely fixed, of any of the routes referred to in the act entitled 'An act making a grant of lands to the State of Iowa, etc.,' * * * approved May 15, 1856, you will, without awaiting further instructions from this office, cease to permit location or entry, by pre-emption or for any purpose whatever, of the lands within fifteen miles of said route, and will, without delay, transmit to this office a carefully prepared list of all sections and parts of sections, with township and range, in your district cut by such route of said road, and have the line thereof accurately laid down upon the official township plats of survey in your office. You will advise this office of the precise date of filing the maps of location of such road or roads and by whom filed.

"HENDRICKS,
"*Commissioner.*"

Received Nov. 14, 1856.

Defendants offer and introduce in evidence as Exhibit "16" duly certified copy of a letter from the register and receiver of Sioux City land office to Commissioner, dated Oct. 31, 1856 (objected to as last above), viz:

"OCTOBER 31, 1856.

"SIR: Your letter of 13th ult. and telegram of 20th ult. have been received to-day, and instructions will be acted upon.

"S. P. YEOMANS, *Register.*"

127 Defendants offer and introduce in evidence as Exhibit "17" a duly certified copy of letter from register of Sioux City land office to Commissioner, dated Nov. 5, 1856 (objected to as last above), viz:

"NOVEMBER 5, 1856.

"SIR: By your dispatch of October 20 I am directed not to allow any more pre-emptions within the limits of railroad grants. Since receipt of dispatch I have refused all applications. It is claimed that persons who commenced their settlement in advance of receipt of said dispatch cannot be denied the right to file their declaratory statements at any time within the three months, under act of 1841, inasmuch as their rights have accrued before land was withdrawn. Your opinion is desired.

"S. P. YEOMANS, *Register.*"

Defendants offer and introduce in evidence as Exhibit "18" a letter from the Commissioner to the Sioux City land office, dated November 21, 1856; received December 18, 1856 (objected to as last above), viz:

"NOVEMBER 21, 1856.

"Register, Sioux City:

"In reply to your letter of 5th inst., you are informed the dispatch of 20th ult. had for its object the preventing or forbidding of entries by pre-emption predicated upon settlement which might be made after receipt of dispatch. Where settlement was prior thereto and all requirements of the law have been or may be — such declaratory statements are to be received and entries permitted.

"HENDRICKS,
"*Commissioner.*"

Received December 18, 1856.

Defendants offer and introduce in evidence as Exhibit "19" a copy of letter from register of Sioux City land office to Commissioner, dated Nov. 14, 1856 (objected to as last above), viz:

"NOVEMBER 14, 1856.

"SIR: In compliance with instructions contained in your letter of October 22, I have to state that there was filed in this office on the 2d inst. a map, showing location of Dubuque and Pacific
128 railroad, by H. P. Leech, secretary, duly certified by president and secretary of Dubuque and Pacific Railroad Company.

"S. P. YEOMANS, *Register.*"

Defendants offer and introduce in evidence as Exhibit "20" certified copy of letter of register of Sioux City land office to Commissioner, dated November 14, 1856 (objected to by plaintiff as last above stated), viz:

"LAND OFFICE, SIOUX CITY, *Nov.* 14, 1856.

"Hon. Commissioner.

"SIR: In compliance with instructions contained in your letter of 22d October, I have to state that there was filed in this office, on the second day of the present month, a map showing the location of the Dubuque and Pacifiic railroad. Said map was filed by H. P. Leech, secretary, and duly certified by the president and secretary of the Dubuque and Pacific Company.

"S. P. YEOMANS, *Register.*"

Defendants offer and introduce in evidence as Exhibit "21" certified copy of the certificate attached, found in the United States land office at Sioux City, showing the certificate of location of the line of the Dubuque and Pacific railroad, dated November 12, 1856 (objected to as last above), viz:

"OFFICE DUBUQUE AND PACIFIC RAILROAD,
"DUBUQUE, *Nov.* 12, 1856.

"It is hereby certified that, in pursuance of the act of the Legislative Assembly of Iowa, approved July 14, 1856, entitled 'An act to accept of and carry into effect the trust conferred upon the State of Iowa by act of Congress entitled "An act making a grant of land to the State of Iowa, * * * "' etc., approved May 15, 1856, the map shows the location of the line and route through the Sioux City land district of Dubuque and Pacific railroad extending from city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road as definitely fixed in compliance with said act of Congress of May 15, 1856, by engineers of said road, in accordance with a resolution of the board of directors of said company passed May 26, 1856."

129 Signed by J. P. Farley, president of Dubuque and Pacific Railroad Company; attested by H. P. Leech, secretary thereof, with seal of company attached.

Defendants offer and introduce in evidence as Exhibit "22" a certified copy of letter from register of Sioux City land office to Commissioner, dated December 1, 1856 (objected to by plaintiff as last above), viz:

"DECEMBER 1, 1856.

"SIR: In compliance with instructions in your letter of Oct. 22, 1856, I send herewith a list of sections and parts of sections in townships and ranges in this district cut by Dubuque and Pacific Railroad.

"S. P. YEOMANS, *Register.*"

Defendants offer and introduce in evidence as Exhibit "23" certified copy of letter from Commissioner to register of Sioux City land office, dated June 2, 1857 (objected to as last above), viz:

"JUNE 2, 1857.

"Register, Sioux City:

"Yours of Dec. 18th last, inquiring in regard to rights of pre-emption on even-numbered sections within the railroad limits of the railroad grant has been received. Replying, I have to state that all lands in Iowa withdrawn for railroad purposes are subject to claims by pre-emption resting on settlements made prior to the time when the line or route of road or any part thereof is definitely fixed, provided that date be prior to the reception by you of the dispatch of absolute withdrawal, dated Oct. 20th last. The even-numbered sections belonging to the United States are subject, under act of March 3, 1853, to pre-emption at $2.50 per acre. You will perceive that under said act settlement must be made prior to the final allotment of alternate sections to the railroads by the General Land Office, and that proof and payment may be made at any time before the land sahll be offered at public sale.

"HENDRICKS,
"*Commissioner.*"

Defendants offer and introduce in evidence as Exhibit "24"
130 copy of letter from Commissioner General Land Office to register and receiver Sioux City land office, dated November 13, 1857; received December 2, 1857 (objected to as last above), viz:

"NOVEMBER 13, 1857.

"Register and receiver, Sioux City:

"To avoid any misapprehension in the matter of the instructions from this office, dated Oct. 22, 1856, directing a withdrawal of all lands within 15-mile limits of the route of any of the railroads in your district, referred to in act of May 15, 1856, from any entry by pre-emption or otherwise ('upon the filing in your office of the duly certified map of the line or route as definitely fixed') I have to advise you *of* the interdict contained in these instructions did not apply to pre-emption claims where the settlements were made in good faith prior to the passage of said act or prior to the date of the reception by you of the aforesaid instructions. All *bona fide* claims, therefore, falling within the limits aforesaid, based upon actual settlements made prior to the dates above referred to, may be proved up and consum-ated within the period fixed by law for making proof and entry of pre-emption claims for the reason that the parties had inceptive or inchoate rights which could not be interfered with, and where claimants in such cases have been restrained from proving up by reason of a misapprehension of the instructions aforesaid within twelve months from date of their settlement, that fact will not vitiate their rights, and they may now be permitted to prove up and make entry as though the usual limitations had not expired.

"HEDDRICKS,
"*Commissioner.*"

Received Dec. 2, 1857.

12—157

THOMAS L. GRIFFEY (called for defendants), sworn, says:

I am one of the defendants. I know the premises in controversy. As distinctive premises I knew it in 1854. I knew the ground in 1852. I am the Griffey who pre-empted it.

Q. State when you settled upon it for pre-emption purposes.

(Objected to by plaintiff as incompetent and not best evidence.)

131 A. It was July 19, 1856.

I built on it a house of pine boards 14 x 16, one story, with partition, pine floor, scantling 2 x 4, pine, and I had half an acre or acre of ground broken. I was at the time a married man. I moved onto the place in August or September, before I proved up in September, 1856. I was then living on the place—about September 5. This house I hauled away to where I wintered in Sioux City. I had a sick child that winter, and used the lumber for fire-wood that winter on account of severe winter. I ordered lumber to build another house on this land that fall, but did not get it, but in the spring I built another house of cottonwood and pine—built, I think, with boards up and down, covered with shingles, and one and one-half story high—large enough for my family. It was built not far from southwest corner. I think it remained there about two years and removed without my permission while I was absent in Colorado in 1859. I have never surrendered up to the Government my certificates of entry for this land or applied to have refunded to me what I paid the Government for the land. I never received any written notice of the cancellation of my pre-emption. I learned of its suspension by the clerks in land office afterwards.

Q. State what you have done, beginning from the first, to procure the reinstatement of the suspended entry and title.

(Objected to by plaintiff as incompetent, indefinite, and calling for secondary evidence.)

A. In summer of 1857 I learned of its cancellation. I consulted Judge Hubbard about it, and he told me he would look after it, but nothing was done till spring. At that time Mr. Millard was sent to Washington to look after some swamp-land matters for the county. I empowered him to look after my matter. He employed a Mr. Young in Washington, who corresponded with me from 1858 to 1860. I sent him my papers. After his death I employed one Niles to look after it, but he did not take hold of the matter to get it righted, but did what he could. I then employed Col.

132 Shalter to look after it, and he wrote me from time to time. Mr. Taff, a member of Congress from Nebraska, in 1869 or 1870, introduced a bill in Congress for my relief, and before that I had employed Pugh, of Washington. The bill failed and Pugh went out of the case, and nothing further was done until O. C. Tredway was employed, but I don't remember when, and Curtis, Earle & Burdette acted with him, but I don't remember when they commenced.

Q. Since you settled on this land as pre-emptor have you at all times been in possession of this land and claimed possession?

(Objected to as calling for conclusion of witness and not a statement of facts.)

A. I have always claimed possession and been in possession most of the time.

After my house was removed from there in my absence, as before stated, I spoke to Mr. Pritchard about going onto the land. He had a house which he could move as well as not. This was in 1868 or '69. I don't know how long he remained there—it was a number of years. I made this arrangement with Pritchard under the advice of my attorney. I received notice from Pugh, my attorney, that I must take actual possession, I think in 1867. Pritchard was to have use of the ground, but I don't know whether he was to have title to a piece or to use for a length of time. Mr. Chamberlain made the arrangement with Mr. Pritchard. I don't know of there being any other improvements on the land at that time. There were some buildings made close to south and west line, which changed my knowledge of the exact bounds. I don't think there were any other improvements then. After I retained Tredway, Earle, etc., they were entrusted with the management of the affairs and possession and control of the land as well. I had no knowledge of any adverse interest further than cancellation stated. I have no knowledge of any individual. I have seen the patent in evidence in this case that was obtained by my attorneys. I know of the improvements made on this land in 1883 by O. C. Tredway for
133 me and Chamberlain. The defendants were claiming possession then. The improvements made in 1883 by defendants was a wire fence around the quarter section and, I think, a barn. There were some squatters on the land and some with our permission.

Cross-examination:

In 1854 I knew the position of this land with reference to the town site of Sioux City. It joined Central Sioux City on the north. At the time I made my settlement on this land, on July 19, 1856, I was living across Perry creek, in Sioux City. The breaking of half an acre was done after laying foundation of my house. I can't tell just when it was. I intended to break up more but did not. There was no enclosure. It was never cultivated by me after that. The next summer I went south with my child and was absent most of the summer. I had my family in that house three or five days before I proved up, and then moved into a house in Sioux City with my family. I am sure I stayed there over night with my family. I took somebody down to see me live there. I remember distinctly from the amount of brandy and cherries it took for the occasion. I stayed there longer than my family did because my child was sick. The witnesses of my living there I took down with me when I moved into the house. I never done any farming on the land. After the cancellation I did not want to go to any great expense. I moved this house off in the fall, as it commenced to get cold—a month or more after I proved up. I moved away immediately after I proved

up. I let the house stay awhile. The snow came early, and I had matters across the river to look after, and I got the house off of the land that fall to save the lumber. The next house I did not build till spring of 1857—not before May. I never lived in that house, but lived in Sioux City. I never lived on the premises after I proved up. The residence I spoke of three or four days before I proved up was the only residence I ever had on the land, and the improvements I have mentioned were all of the improvements I ever made on it.

It was in July, 1857, I learned my pre-emption was can-
134 celled. I never lived on the premises after the cancellation or made any improvements until within the last three or four years. I don't know that this second house was never occupied at all. I supposed that when the second house was removed from the land in my absence it was by the plaintiff, but don't now think it was. I supposed at the time it was removed on the order of plaintiff under the cancellation. This house was removed in 1858 or 1859.

I was not living at Sioux City when the surveyors commenced running their line from Sioux City. I had a trading post two miles below Sioux City. I knew that there had been a party of surveyors here, but I gave it no attention. I was not here when it was made. I remember when it was made. After I proved up I continued to live at Sioux City until fall of 1857 or spring of 1858, and have been a resident of Nebraska ever since. Immediately after proving up I lived in Sioux City until I moved to Nebraska, in fall of 1857.

About the time I made this settlement, and after, I was trading with the Indians, and I kept a saloon in Sioux City a short time in fall of 1856. I was then admitted to the bar, and next winter I did not have much to do except fighting for my claim across the river after my claim was cancelled here. I had not engaged in any agricultural pursuits before I took this claim to any considerable extent. Farming had not been my business. I had surveyed some. Chamberlain was interested with me only in proving up the pre-emption. He had no interest previous to the time I deeded to him. I think I gave him a quitclaim, because it was made after the cancellation, I think. I think Pritchard went on this land in 1868 or 1869. I don't know what house he put on it or where he got it. I am not sure that he moved any house on it. He lived in a house on the place. It was not far from the present depot of the Illinois Central Railroad Company. I don't know when Pritchard put the house there only from conversation with Chamberlain. I don't know whether it was after railroad was built or not. It was east of the depot. I think I saw some corn growing on this piece across the Floyd, above the mill,
135 one season. I never knew whether there was a large or small portion cultivated across the Floyd until I got my patent. I was not on that side of the creek except to go to the cemetery. From the time I moved off the pre-emption I did not have much to do with it. I did not abandon it. I was fighting for it and never gave it up a moment, and with regard to the houses that we built there I

gave various parties permission to do certain things. I can't remember but one now. I know Thomas Green came to me for permission years back to make brick there. I don't know whether he ever made brick there; that is why I say I do not know in regard to other men whether they had my permission or not. I don't know that any one ever went on there on my permission except as I have stated. The arrangement with Pritchard was not in writing, I think. I don't know how long he remained. It was a good while after the cancellation that Judge Hubbard spoke to me about it, and I told him I would like it if he would look it up. I learned of the cancellation soon after it was cancelled. I think somebody sent me notice of it from Washington, and I think the clerks and receiver of the local land office told me, and I told the receiver that I would not apply for my warrant or money. I think he told me that the land office required him to ask me to apply for the money, and the Government still has my warrant and money. Mr. Taff and Mr. Shalter, whom I have mentioned, were members of Congress. My bill for relief in Congress was introduced in 1870 and failed. I don't remember what steps were then taken, only Dr. Graff was looking after it and wrote and informed me about it. I have a written contract with my present attorneys; don't know when it was made. From 1870 to 1880, I can't fix the dates as to what I done. Dr. Graff was acting for me for fifteen or eighteen years, and I had another attorney in Washington. I can't find any of my letters or any dates. The matter was brought up afterwards by the Land Department and passed upon by them. They held adversely to me both before Commissioner and Secretary of Interior. I don't
136 know what was then done. After the bill in Congress failed Pugh advised me to get some one on the land, and Pritchard was got. Hs is the only one that was employed to go on, but I have given others permission to go on, but whether they did I do not know. I think I made arrangements with Pritchard in 1869. I don't know how long he stayed there, as I lived in another State and was seldom here. I don't know when he moved house off. I remember nothing of anything being done on these premises by defendants from the time Pritchard went there until we commenced fencing the land in 1883, except I paid in part for a barn on the premises, but don't know when. Before we put the fence around there were other improvements there. I knew the land had been fenced on north and east of the Floyd before we put up our fence, and it had been there for a long time. When I got my patent and commenced my improvements I found it occupied by these squatters. I did not know about Hedges' or Hughes' occupancy of it. I think some one told me that Doss had a corn crop on there, and that he done it at his own instance. I think Joy told me, but don't remember. I have been over at Sioux City often every year. Whenever I passed up the east side of this land I could see across the Floyd river. I noticed this crop of corn, and I think there were fences on then. If there were, I suppose they were Doss' fences.

I don't remember seeing the Iowa Falls and Sioux City Railroad Company in the work of building their railroad. There is a rail-

road depot there near the land. I might have seen them constructing the road, but don't remember of seeing them while building the depot. Most of my efforts have been at Washington. I done nothing here except what I have spoken of. I don't know when Chamberlain left Sioux City. I don't know when I saw the crop of corn growing on there. I remember the occasion of seeing it, but do not remember what year, as the thing occurred so often. Between 1865 up to the time I got the patent I passed on the two sides of the land.

137 I could see what improvements were on this side of the creek, and could see the others, but paid no attention. It was prairie land mainly—nothing particular to obstruct the view. There was some brush above the mill that would obstruct the view of the fence considerably. I never filed on any land for pre-emption before this or after I went into Nebraska. The parties I made this arrangement with to carry on this litigation for me are defendants, except Tredway. My contract was with Tredway, Curtis, Earle & Burdette. I knew that the railroad company were claiming the land. I knew that my entry had been cancelled in their behalf. I did not know that they were making any further claim, but supposed the matter was in abeyance in Washington for a long time. I knew they had asserted their rights to it right away, and that the ruling had been in their favor. I never took any steps to test the question as to their rights to this land further than I knew one caveat was filed by the company and supposed that they just stood there. This was after the cancellation. I was not personally aware until a few years ago that there was any further status to the case. The county was claiming this as swamp land in 1858, after the cancellation.

Redirect examination:

The first house I put on this land cost me $200. After I made proof and obtained certificate of entry I moved back into town because of sickness of my child. My second house was not finished at time I knew of cancellation. It was commenced before, but not quite finished on account of my knowledge of cancellation. The second house cost me about $365. I have here a letter written me by my attorney Niles. (Defendant offers same in evidence.)

(Objected to by plaintiff as incompetent, immaterial, and calling for secondary evidence.)

Introduced as Exhibit "25," and is as follows:

"WASHINGTON, *April* 13, 1867.

"Thomas L. Griffey, Dakota City, Neb.:

"Mr. Graff has called my attention to a claim of yours for northwest quarter 27–89–46, which was in conflict with railroad location

138 and rejected by the General Land Office, and which claim was placed in the hands of Judge Young by E. Millard in 1858, probably December. All these papers are, I presume, in the General Land Office. I don't recollect the certificate of loca-

tion, but if you sent it to Judge Young it will be found with his papers in possession of Mrs. Malston Young, his widow, a resident of this city. If I can serve you I will be pleased to do so.

"SAMUEL V. NILES."

I have here a letter received by me at Denver from Mr. Milliard in 1859. (Produces letter and same is offered in evidence.)

(Plaintiff objects as last above.)

Letter introduced in evidence as Exhibit "26," and is as follows:

OMAHA, NEB., *Sept.* 1, 1859.

"Thos. L. Griffey, Denver:

"Your note of 6th August was handed me a few days ago by a return runner. I herewith send you copy of letter received from Richard M. Young on the subject of your pre-emption, dated 20th June, 1859. I received the letter about July 4, and immediately wrote Field at Sioux City, who answered that you had gone to the mines, and he cannot tell me where to address you. You will notice from Judge Young's letter that your case needs action of some kind, and the judge appears waiting instructions. Now, what shall we do in the matter? I feel an interest in your success and will readily serve you to the best of my ability; but you, of course, are the man to say and direct. Now, which of the courses pointed out by Judge Young do you think best to adopt and what shall be done? I have written him that if his efforts procured you success you would give him $500, to which he has returned no answer, but undoubtedly would feel entirely satisfied with that amount.

"I think you will, upon receipt of this, have as much posting in this case as I can give you. Nothing has been done, to my knowledge, in the swamp-land claim for this same land, and I don't know how much encouragement should be borrowed from that. You can tell as well as I whether it will be better to go ahead as though there was no such chance at all. Upon receipt of this let me hear from you.

"E. MILLIARD."

139 I am not able to produce any of my correspondence with Mr. Young. Dr. Graff acted for me up to the time Mr. Tredway took the case, while he was in Washington.

Recross-examination:

The roof of my first house was made of pine lumber. There were two half windows in it, 8 x 10 lights. I think door was made of rough lumber. I moved off the lumber of this house in fall or winter of 1856, and burned part of it up. The second house was never quite finished. It was never plastered, and no chimney at that time.

Q. This was about the time they were following out along line of the road making pre-emptions, was it not?

A. I know nothing about it personally. I heard considerable

about it at the time. My trading post was about two miles from this land. I think I had at this time heard it talked through the community with reference to this proposed line of road. There was never much said about that survey until after this contest. I never heard anything of any consequence about it. I knew there had been a party of surveyors here, and that was about the extent of it; there was not much said about the survey after it was made. The question did not arise whether the lands about the Floyd were subject to pre-emption until after the legislature had passed the act accepting the grant, which was after that. I think the legislature accepted the grant July 14, 1856. I don't remember whether it was before my pre-emption filing or not. I have not my certificate of entry; I sent it to Mr. Young. I don't know whether my attorneys got it or not. I did not get my patent until after the act of 1876. I have no personal knowledge as to what the parties done in Washington.

Redirect examination:

I was admitted to the practice of the law in 1856 or 1857. I have lived in Dakota City, Nebraska, since 1861, and up to that time at Covington, in Nebraska, opposite from Sioux City, on the Missouri river.

F. J. LAMBERT (called for defendant-), sworn, says:

I live in Sioux City, and have since May 18, 1857. I
140 know the land in controversy, and have since that time. When I first came here I was interested in the northeast quarter of section 27. I know there was a house on the northwest quarter in 1857, but I don't remember how large. It was built of sawed lumber. I think it was moved away in 1861, uptown, and I occupied the place where it was moved in Sioux City in 1861, and Mr. Joy also. We were standing guard during the Indian excitement. I know John Doss; he came here in 1858 or 1859. Doss attempted to pre-empt the land over, but when I cannot say. I was sheriff at the time. I think J. P. Sloan, who was then in the land office, was advising him to procure the land.

Cross-examination:

I lived on the northeast quarter of 75 in the fall of 1857. I used to see the house on northwest quarter almost every day. There was nothing else on the land. The house was a board house—boards nailed up and down, and a roof. I can't say whether it had a chimney; had two windows, I think. It had not been built long when I first saw it. It was there when I came. As near as I can remember, the house was there. I did not see any house built there in spring or summer of 1857. It was completed when I first went there. It was built of cotton-wood. No one lived in it, to my knowledge. I never saw any one living anywhere on the land in those days, to my knowledge. I could not say how long before the summer of 1861 the house was moved into town. I could not state

the time Doss attempted to pre-empt the land. I only heard he had filed on it. I was not there. I have no personal knowledge of any filing, or whether he was ever allowed to file. All I know is from hearsay. He farmed on this land for a great many years. I think he must have commenced there as early as 1858 or 1859, and for several years after 1860, and he had part of it fenced north and east of the Floyd, and farmed it right along continuously. He had quite a portion of the land under cultivation—good sized field. I know about its being occupied by Hedges as a pasture. I think Doss farmed it until Hedges put his fence on it. When I
141 first knew this land it was known as the "Griffey" quarter, and afterwards as railroad land.

Redirect examination:

The matter of Doss' pre-emption I knew by reports. I had some talk with him about it. I think the house was on the land in 1859. It was before Wilgocki came here that Doss tried to pre-empt the land.

Recross-examination:

Wilgocki came here in 1866 or 1867. I don't remember what Doss said about pre-empting the land. I don't know that he ever got any papers. There were others watching this piece of land to see if they could not get a chance at it. I have no distinct recollection of seeing a house on the land in 1859, but think so.

S. T. DAVIS (called for defendants), sworn, says:

I live in Sioux City, and have for 30 years. I know defendant Griffey, and have for about 30 years. I knew him in 1856, when he pre-empted the land. I did not know personally of his being on the land in 1856. I was register of land office in 1864. I knew John Cleghorn; he was my clerk in land office, and subsequently became register of land office in 1866.

Cross-examination:

I don't know positively where Griffey was living in 1856. I have seen him around here in 1856 and 1857. I went out of the land office in summer of 1865.

WM. B. TREDWAY (called for defendant-), sworn, says:

I live now and have lived in Sioux City township since 1856. I know T. L. Griffey, and have since summer of 1856. I know in a general way the land in controversy, and did in 1856. About Griffey's living on and having improvements on this land in 1856 it is pretty hard to draw a distinct recollection between what I knew and what I know from recollection. I recollect Griffey at that time held what we then termed a "claim" on this land, and had "claim" improvements like the balance of us. He had these "claim" improvements on the land along after middle of the season or
142 towards the fall. The improvements were a little board house, not overly substantial, and built of lumber, I think,

probably fourteen or fifteen feet square. It was on this side of the Floyd river and on this side of the slough. I can't say that I did know of his living on the land, further than in a general way. I think there were no other improvements in this land anywhere near that time. I know of the fact of Griffey's rebuilding, but whether from actual observation or otherwise I cannot say now. I don't know what the rebuilding consisted of; it was quite a bit more of a house; built of sawed lumber. It was a year or two after the first house that I knew the second house was there. I don't know what became of it. I was acquainted with the character and quality of pre-emption improvements on this section in 1856.

Q. State how the improvements which Griffey had in 1856 compared with general improvements of the pre-emptors.

(Objected to by plaintiff as incompetent and immaterial.)

A. The others had mostly log houses, while his was a little board house. I recollect the occurrence called the "Ongee" war about claim on section 22; I think in the spring of 1857. I think the war was over when I came here in 1857.

Cross-examination:

When I first knew Griffey after I came here he was living down on the Missouri bottom near Sloan; this was in the summer of 1856. I have no personal knowledge of their living on this land in question. There was no other improvements on this quarter section but this little house that I know of in season of 1856. I could not say when the house was rebuilt. It is my recollection either from observation or general history that Griffey went on this land and built a house and moved into it after he pre-empted. I don't say that I know it from actual observation. I don't know whether he ever finished the house. I think there were doors and windows in it. I can't say that I ever did or did not see any one living in it.

143 I recollect of some trouble across the river in Nebraska between Griffey & Stranney and others who were holding claims over there; he might have been over there in 1857, and I recollect he took an active part in that trouble over the river, whatever it was. The shanty that I spoke of as being on the land in controversy was a "claim shanty," as was generally denominated at that time.

P. W. PRITCHARD (called for defendants), sworn, says:

I live in Sioux City, and have since March, 1857. I know what is called the "Griffey quarter." I don't know it by number. I knew Geo. W. Chamberlain in his lifetime and know defendant Griffey, and have known both of them since 1857. I have lived on the land in question. I think I went onto it in 1871. Previous to 1871 I lived near this land—previous to that, from 1869—and after that I moved onto this land. Between that time and the time I moved onto this land I had several conversations with Griffey. He wanted to get some one to move on this ground.

Q. State what conversations you had with Griffey with reference to your going onto this land for him and Chamberlain.

(Objected to by plaintiff as incompetent and hearsay.)

A. Move over there and he would give me a certain piece of ground. He said the railroad company were attempting to rob him of it, or something else; I forget the exact language. Anyway, he wanted to get a man to be on the ground for him.

Q. He applied to you to go there and live with him?

(Same objection to this as last two interrogatories, and as leading.)

A. Yes, sir.

After I had this talk with Griffey I moved my family onto the ground—this was in 1871—and I lived there till 1875. I had several talks with Griffey before I moved on there. The house I lived in on this land formerly belonged to a man by the name of Dally. I bought it of him. I moved the house away in 1878.

144 Q. What arrangement was made between you and Griffey as to what you should do in the way of looking after this land while you lived there?

(Objected to as incompetent and immaterial.)

A. He gave me to understand that he wanted some one on the land to look after things.

Q. To hold possession?

(Objected to as leading.)

A. Yes, sir.

While I lived on this land I don't know anything about whether other individuals were occupying the land while I lived in the house. I moved out in 1875 and rented the house to a tenant. I don't know that I continued to look after the interests of Griffey while my house remained there. I looked after my own interests then.

Q. What was the understanding between you and Griffey and Chamberlain up to the time you took your house away as to whether you were occupying the premises for them or not?

(Objected to as incompetent and calling for secondary evidence.)

A. We never had any understanding except the one understanding when I went there. I moved the house off in 1878.

Cross-examination:

Prior to moving this house on this land I lived on Howard street between Tenth and Eleventh streets, from 1869 till fall of 1871. At that time Dally was living on this land. He built this house on this land in 1870. He was then engaged in building depots, etc., for the Iowa Falls and Sioux City Railroad Company. He told me he was working for John I. Blair. He was working for the company at the time he built this house. The Blair referred to was con-

structing the Iowa Falls and Sioux City railroad, and he got Dally to come out and work for him. The depot he built down there was about three hundred feet from where this house was he built on the land. The house was located directly east of Clark street about fifty feet, and probably two acres enclosed; fence was right along line of Clark street.
145 Ewins built the fence. The fence was there when I moved into the house, and was built by Ewins, and he was working at the time for the Iowa Falls and Sioux City Railroad Company. Ewins worked the garden and fenced it. Ewins and Dally were working for the railroad company up to the time they left the house. I rented the house first from Dally. I think I bought the house and improvements from Dally the next season. I think I got a receipt for the amount paid, which I think I can find. This was in 1872, I think. It was between 1869 and 1871 that I had talks with Griffey. It was before I rented the house of Dally. The most of my talk was with Griffey. I can't tell when it was, but it was before I moved on. I was to have a piece of land for garden. While I lived on this land there was a shanty on the east side of the Floyd on this land. Before I moved away a man by the name of Riley built a shanty south and east of me. I remember there was a field on this land, north and east of the Floyd, which was there long before I went on the land. I went away in 1864 and returned in 1869, and there was a field there when I came back. Doss worked there after I came back; he worked there while I was living in this house. There was a sort of horseshoe bend on the east of the Floyd on this land, which was fenced. I never interfered with Doss' occupancy of this land; I don't know that I ever spoke to him about it. I guess I told Riley it was a good place to put a house. I think of no other. All I did with anything was the little piece that I had fenced. I don't know that I did anything more with reference to this land. I looked over the land lots of times. I performed no acts upon any portion of it except the little piece I had fenced there around the house. I was there representing Griffey and myself at same time. I represented him by living on the ground, and that is about all I did. Griffey told me that the railroad company was claiming the land, and that was the reason why he wanted me to go on there. I never interfered with the railroad company's occupancy of the land. I never informed them
146 that I was protecting Griffey's interest; they never asked me. I was never instructed to ascertain by what right Doss was on the land, and I don't remember that I ever did ascertain. The house I bought of Dally and the said — and Riley's house were all the houses that were there. George Needham rented of me in 1876 or 1868. He was then running a brick yard on this land in question. He did it by my authority. I leased him the ground and house. I did not notify Griffey of this. This was my piece of ground—this enclosed piece of ground that I occupied; they gave it — me. Needham lived there one season. I don't know myself when I moved this house off, but have talked it over with my wife and I made a memorandum of it to-day. When I moved this house off

I moved all my improvements and abandoned the land, and have not looked after it much since. While I was living on it I knew this land across the creek was being worked and occupied by some one else. I don't think Griffey told me the company had a patent.

One time the agent of the railroad company came to see me and said they owned the house on this land, and I said they did not, and he said if I owned the house he wanted me to get off, and I did take it off. I would have been there, I expect, if it had not been for them. This was a month or two before I moved the house off.

Redirect examination:

The railroad company never tried to buy my improvements. I did not know personally who was occupying the plowed land east of the Floyd or how they occupied it, or that they were occupying it for railroad company. I don't know that any one pretended to take possession of any of the land for Griffey before I moved off.

WM. R. SMITH (called for defendants), sworn, says:

I live in Sioux City; came here first in 1856. I was away in winters of '56, '57, and '58. I knew Griffey. I think I first became acquainted with him in 1858. I know the land in question. I was receiver in United States land office in Sioux City from 147 July, 1865, to July, 1878. S. T. Davis was register first; then Zeibach; then Stewart; then John Cleghorn, and then Geo. H. Wright. I think Cleghorn's last full term expired in 1871, and he had served one full term and a fraction of a term previous. I know John Doss, and have since 1858.

Q. State what, if anything, you know with reference to John Doss attempting to pre-empt this land during the time you were such receiver.

(Objected to as incompetent, immaterial, and irrelevant.)

A. I have quite a distinct impression that I saw Doss in the office, and that he offered to file a pre-emption on this land in suit. I think Cleghorn was register. I think it was in 1870 or 1871.

Q. State what is your recollection as to the manner in which this quarter section has been generally, if not universally, designated on the various maps made public in Sioux City as to who was the proprietor or owner of this land.

(Objected to as incompetent, immaterial, and not best evidence.)

A. I am quite sure I have seen it designated on some of the maps as the Griffey tract, but can't say how many.

Cross-examination:

About that time (1870–1871) there were several attempts made by different ones to pre-empt this tract and other railroad tracts, but I can't fix the time exactly. Inquiries were made frequently at the land office at those times as to the rulings of the department with reference to some of these pieces, and I remember of Doss being in and talking about it. He never took any pre-emption. It was never

filed. I think he made an application; it seems to me he brought a declaratory statement. I think Dr. Hunt talked about pre-empting it also. The Sherwin map had this tract of land marked as the Griffey tract; it was lithographed in 1857 or 1858. I don't know of any other maps it was so marked on. The Sherwin map was one of the early maps; it is only my impression that it was so
148 marked on that map; would not state positively; it was not a map of the land department; it was a private map of Sioux City.

O. C. TREDWAY, sworn, says:

I live in Sioux City and have since May 4, 1857. I know defendant Griffey and have since 1858. I knew Chamberlain (G. W.) since 1859. I know the land in controversy and have since 1858. I have been a practicing lawyer during all my residence in Sioux City. I remember of improvements being on this land in controversy as early as 1858. There was then a frame house of sawed lumber on the southwesterly corner of the tract, known to me at the time as the Griffey claim or pre-emption house. I think it was one and a half story, with shingle roof, with siding nailed up and down. I think it was there till spring of 1860. I think I became acquainted with this case as attorney for Mr. Griffey in winter of 1877–'8.

I know John Doss, and have since 1860. I was consulted once by or for him as to the practicability of his pre-empting this land by reason of his having cultivated a portion of it for a number of years, and I advised against it. (Objected to as incompetent and immaterial.) I know it was after the war and before Cleghorn went out of the land office. After making arrangements with Griffey and Chamberlain, by contract between them and myself and Curtis, Earle & Burdette, we took steps to secure the title to this land under his entry of 1856. We presented to Commissioner an application for restoration of Griffey, of his rights under his entry of 1856, and I have here a copy of our petition, which I here present and ask it — marked Exhibit "27," and offer same in evidence.

(Objected to as incompetent, immaterial, and not best evidence.)

Introduced in evidence as Exhibit "27," and is as follows:

"To Hon. Commissioner General Land Office, Washington, D. C.:

149 "The application of Thomas L. Griffey for reinstatement and confirmation, under the act of Congress approved April 21, 1876, of his entry for certain lands in Iowa, represents—

"That in 1856 petitioner was duly qualified to enter public lands under the pre-emption laws of the United States; that on the 19th day of July, 1856, he settled upon and occupied northwest quarter 27, 89, 47, subject to pre-emption, and on that date filed in the land office at Sioux City his pre-emption declaratory statement No. 263 for the tract.

"That he continued to occupy, cultivate, and improve said land until September 5, 1856, when he proceeded to said land office and,

after making due proof of his compliance with the pre-emption laws, paid therefor by M. B. L. w't 53493, act 1855, for 120 acres and cash for remaining 40 acres, as per register and receiver's certificate of location No. 53493, and excess receipt No. 438, September 5, 1856.

"That on July 7, 1857, the then Commissioner of Land Office cancelled petitioner's pre-emption location and entry for conflict with grant of lands to the State of Iowa by act of Congress of May 15, 1856, for benefit of Dubuque and Pacific railroad, holding, as will be seen by his letter to the district officers at Sioux City (copy of which is hereto annexed and made a part of this application), that the right of pre-emption upon said land ceased on the definite location of said road past the tract, which was on July 6, 1856, thirteen days prior to petitioner's settlement on the land.

"That petitioner was notified of said action, but nothwithstanding refused to receive back the warrant returned to the district officers for that purpose or apply for repayment of the purchase-money paid by him, believing said action to be wrong for the following reasons:

"The act of Congress of May 15, 1856, allowed pre-emption rights to attach to lands within the limits of the grant until the line of said road should be definitely located. On May 10, 1856, prior to the passage of said act the district officers at Sioux City were instructed by telegram to suspend from sale or location all lands lying south of line dividing townships 91 and 92.

150 "On May 15, 1856, this withdrawal was repeated by letter.

"On June 19, 1856, the district officers were notified by Commissioner that, under the act, lands within the limits of the grants were subject to pre-emption until the definite location of the lines of routes of the roads. Receipt of this was acknowledged by the register and receiver at Sioux City July 3, 1856.

"On October, 1856, the register and receiver at Sioux City were instructed by telegraph not to admit pre-emptions within fifteen-mile limits of the railroad grant. This was reiterated by mail the same day, and they were informed that diagrams showing lines of routes of road would be sent them.

"On October 22, 1856, the register and receiver at Sioux City were instructed to cease permitting pre-emption entries or locations upon lands within the limits of the grant immediately upon the filing with them of a map of definite location of the road.

"Petitioner believed that the action of Commissioner in cancelling his location and entry was wrong, because it had been permitted in consequence of instructions from General Land Office under which the lands within the limits of the grant of May 15, 1856, were open to such location and entry and remained in that condition until the receipt by the district officers of the telegraphic instructions of October 20, 1856. Petitioners further believed that it was wrong because the department and General Land Office at the time it was permitted held that the right of the railroad company did not attach until the date of filing of the map of location of line of route, which was not until October 13, 1856, and for these reasons peti-

tioners refused to accept the return of the warrant and money paid by him for this land.

"Petitioner represents that on April 21, 1876, an act of Congress was approved entitled 'An act to confirm pre-emptions, etc.'

"That on March 19, 1877, you issued a circular containing the aforesaid law and instructions thereunder, copy of which is annexed.

151 "Petitioner, believing such act affords him relief, applies for the reinstatement of said pre-emption location * * * and issue of patent to him.

"That the land was, by instruction of the then Commissioner, dated June 19, 1856, made subject to pre-emption entry and was so subject to at date of petitioner's filing, July 19, 1856.

"That on September 5, 1856, when petitioner made due proof and paid for the land, it was still subject to pre-emption entry.

"The lands within the limits of railroad grants by the act of May 15, 1856, having been made subject to pre-emption entry by instructions of June 19, 1856, as aforesaid, were not again withdrawn from such entry until receipt of Commissioner's telegram, October 20, 1856, instructing district officers to discontinue receipt of pre-emption entries, which was not acknowledged by the district officers at Sioux City until October 31, 1856.

"That his good faith, actual settlement, occupation, cultivation, and improvement of the land and his full compliance with the pre-emption laws are all shown by the proofs presented on September 5, 1856, and which should be on file in this office.

"CURTIS & EARLE."

As soon as we made this effort to restore entry the Iowa Falls and Sioux City Railroad Company appeared in the case and contested our right, and an argument was made by their attorney, Steiger, a copy of which was furnished us and is here offered in evidence as Exhibit "28," which is an argument made by said railroad company on said hearing. In reply to this we filed an argument, which I produce here and asked to be marked as Exhibit "29." (Objected to as incompetent and immaterial.) Exhibit "29" is a copy of the argument of Griffey's attorneys replying to argument of railroad company.

After the arguments were heard at Washington the claim of Griffey to this quarter section was reinstated and ordered patented.

(Objected to by plaintiff as not best evidence and incompetent.)

152 Time was given to appeal and the Iowa Falls and Sioux City Railroad Company were in default in their appeal, but presented excuses for their default and were allowed to appeal, as shown by copy of letter of Commissioner to register and receiver of land office at Des Moines, which is here offered in evidence as Exhibit "30." (Objected to as immaterial and incompetent.) This is a letter of Commissioner of Dec. 13, 1880, allowing an appeal by the railroad company to the Secretary of Interior.

The case went on appeal to the Secretary of the Interior and patent was ordered to issue to Griffey.

At the time I talked with Earle, Curtis and Burdette, and it was understood and talked between us as to what had been the condition of the land as to Pritchard occupying it for Griffey. (Objected to by plaintiff as incompetent, immaterial, and irrelevant.) I took charge of the case for the parties here as early as 1878. I took possession of the place in connection with Pritchard and remained in possession since in the interest of all the defendants. After I so took possession I caused buildings to be put up thereon. We fenced it, running a fence from northeast corner and run the fence down the line of the quarter and across the south line of the quarter, thence to the Floyd river. There being a good many squatters on this land then, in 1882, I required them to take leases from Griffey and Chamberlain, and in 1882 I leased a portion of the premises to A. P. Anderson by a written lease, which I here offer in evidence.

(This is a written lease made by defendants to A. P. Anderson July 18, 1882, for a small part of the land in question on south side of Floyd river and is set out as Exhibit "31.")

(Objected to as incompetent and immaterial.)

The lease was renewed from April 1, 1883, to April 1, 1884, and is endorsed upon the lease, and also leased a portion of the premises to F. Oleson, which I here present and offer in evidence as Exhibit "32."

(Objected to as above.)

153 (This lease was made by defendants to said F. Oleson July 18, 1882, for a small tract of the land in controversy on the west side of the tract.)

I also leased a portion of said premises to James Jacobs by written lease, here produced and offered in evidence as Exhibit "33."

(This lease was made by defendants to James Jacobs July 18, 1882, for a portion of this land.)

I leased a portion to C. Johnson by written lease, which I here produce and offer in evidence as Exhibit "34."

(This is a written lease made by the defendants to C. Johnson July 18, 1882, for a small piece of this land in controversy on the west side of the Floyd and extended from April 1, 1883, to 1884, endorsed on the back of said lease.)

I also leased a part of said premises to M. Dougherty by written lease, which is here produced and offered in evidence as Exhibit "35."

(This lease is a written lease made by the defendants to M. Dougherty July 18, 1882, for a small piece of said premises on the west side of the Floyd.)

I also leased a part of said premises to Wm. Harris and A. Parmlee, which lease I here produce and offer in evidence as Exhibit "36."

(This lease is made by defendants to Harris and Parmlee July

18, 1882, for a small tract of the land in controversy on west side of the Floyd.)

Defendants offer and introduce in evidence written leases made by them to C. Nelson, S. Kitelinger, M. C. Shaffenbury, D. Mangum, J. P. Jensen, P. Nelson, P. Burns, A. Swanson, as Exhibits "37," "38," "39," "40," "41," "42," "43," and "44," for small tracts of said land on west side of the Floyd, and dated July 18, 1882.

Defendants offer and introduce in evidence as Exhibit "45" a written lease made by defendants to Thomas A. Hughes July 18, 1882, for said land east of the Floyd.

Defendants offer and introduce in evidence written leases made by them April 1, 1883, to C. Rasmasson, C. Bettley, M. J.
154 Dillon, M. C. Dillon, P. Jergrason, P. Moran, M. C. Cowigg, M. Slattery, S. Strader, J. Johnson, A. E. Dodge, J. Mahan, P. Clossen, Seth Strong, C. Ruse, A. Anderson, J. E. Foley, O. Oleson, H. P. Peterson, P. Nelson, D. Maloney, as Exhibits "46," "47," "48," "49," "50," "51," "52," "53," "54," "55," "56," "57," "58," "59," "60," "61," "62," "63," "64," "65," and "67," for parts of said land on west side of Floyd.

Defendants offer and introduce in evidence as Exhibit "66" a written lease made by defendants to J. Storey July 1, 1883, for part of land on east side of Floyd.

(Defendants object to all these leases as incompetent and immaterial, and that defendants' pretended right and possession was acquired by force and violence and in defiance of the order of injunction of this court.)

(Witness resumes:)

Besides these written leases I have some oral leases outstanding with tenants who were occupying portions of the premises, and defendants were at the date of their leases in possession of these premises by themselves and their tenants in this manner, and have continued so in possession up to the present time, and are now in possession with their improvements and most of their tenants. Mr. Doss told me that his witnesses for the purpose of making his pre-emption filing good were Lambert, Sloan, and his brother Chris.

(Objected to as hearsay and not best evidence.)

These tenants were in possession of these premises by their improvements at the time of the commencement of this action, and nearly all under these leases. I made the leases in name of Thomas L. Griffey and Charles Chamberlain, and at the same time represented Curtis, Earle & Burdette and Tredway in their interests.

Cross-examination:

I cannot give you the time in 1858 when I first noticed improvements on this land. The house I have described was on southwest corner of this tract, cannot say how near the line. This house was not built before Griffey took the pre-emption. I don't know whether

the house was ever completed; I was never in it; I don't
155 think. I don't remember as to the chimneys; I think one window; it was built of cottonwood boards not dressed. I don't remember of anyone living in it. I could not say where Griffey was living at that time; the first that I knew about his living and about his family was over in Dakota county, Neb. I think this house remained on the land till 1859 or 1860. I did not know of it being moved off; I knew it was gone. I know nothing personally of what became of the house. I don't recollect of any other improvements on this land in 1858 or 1859. I became interested as attorney for Griffey I think in winter of 1877–'8. I had no particular intetest in it |before, but had been consulted by Griffey and Chamberlain frequently before with reference to it up to 1877 or 1878. I had taken no action as I recollect; I may have done so, but don't recollect. I don't know that I ever done anything for Mr. Chamberlain about it except to confer with him. I think I had a talk with Doss about his pre-empting as far back as 1868 or 1870. I think I saw him at my office, but cannot say positively or who was with him. There were a great many then "fishing" to get hold of this land, and watching for the rulings of the department. At time Griffey made arrangements with us we first settled our employment, and I think first proceedings taken by us in a legal way was to file application in Washington; and under arrangements Earle, Curtis & Burdette had an interest in the land, under a written contract, I to have a one-fourth interest and Curtis, Earle & Burdette a one-fourth interest. John M. Tredway has my interest. I can't say when I ceased to have an interest. I assigned my interest in the contract to John M. Tredway some years ago. I have no interest in the land, but am bound to perform the duties imposed on me. When it was made I was bound to do certain services. I was not to make good anything to John M. Tredway. I sold him the contract, but the contract obligated me to perform certain services to defendants; there is no liability to John M. Tredway if I don't get the land. I have no
knowledge as to this argument being filed by Curtis, Earle &
156 Burdette, except such knowledge as an attorney gets from his co-attorney and knowing the results achieved. I was not present at any of the hearings in Washington. When I became interested as attorney, in 1877–'8, there were some squatters on this land. I do not know whose they were or where they were located. I am not sure there were any then. I had nothing to do with the squatters going on them. I knew at that time with reference to there being a cultivated field at the north and east of the Floyd on this tract, and for a good many years, and my knowledge of it is that it was cultivated by various parties. I saw John and Chris. Doss there. I can't name who else. I think Jerry Cole did, but am not positive or when. I knew that the Doss' at different times used the land—or I supposed they did. I think all three of the Doss brothers used and worked there as they pleased. I have no positive knowledge of how they came to go there or by what right they stayed there. The first improvements we put up on this land was in 1882—in summer or latter part of the season. I think some fencing and barn was first put

up there; the barn was near southwest corner and near west line. I think Herrington built it, and we bought it of him latter part of 1882. This is the first improvements we put on after we became interested, and never put anything on before. The building of the barn I speak of consisted of buying one that was there, built by Herrington; he moved off and we took his barn. Herrington was in the employ of the railroad company. I don't know that we made any improvements in 1882. In 1883 we fenced the premises. There were some squatters on there then. They were our tenants from the year before. They are the same I have referred to in the leases, and some others. I did not know that any were there under permission of plaintiff, and they never so informed me. The only man that I knew that pretended to be there under permission of plaintiff was Hughes, and I made him walk off right quick. I have no recollection that Foleys claimed to be there under permission of plaintiff. They never refused to pay rent because of their permission from plaintiff.
157 They have paid me no rent. I don't know that I threatened any one, but I said if any one on the premises pretended to hold under any landlord except defendants that I should try his right to hold at once. I don't recollect that Parmlee told me that he was there by permission of plaintiff. There was considerable talk by them that "they thought the railroad company owned it," but plaintiffs were not mentioned. When I got their leases I told them that we had a patent to that land and owned it, and if they wanted to stay there they must take the leases; and I told them that the railroad company had no land there. This was the summer of 1882 that they came and got the leases or that I applied to them for leases. The leases were not all signed the same day, but were prepared for signature and dated on same day. They did not sign the leases on the date the leases purport to have been executed, but they were made during the time and prior to the expiration of the leases. Their rights under the leases was from July, 1882, to April 1, 1883. I claim they were my tenants from the date of the leases. They went on the premises as squatters, as I understand it, without license. The lease I made with them was the first of our arrangements with them or written leases, though I had told them that they would not be disturbed. There was no one that I had boisterous arguments with except Mr. Joy, who came down and forbid me doing what I was doing when building this fence, and I told him that he must not interfere with me. This was in 1883; and I had some words with Hughes. Joy forbid me fencing. This was prior to the issuing of injunction and after fence was nearly built. We built the fence on east and south line, on east side of the river, and some on south line on west side of the river, and the last fence we built was on the west line. I had no controversy with people while I was building the south line. When I commenced building the fence on the east side of this quarter there was some fencing already there on the east side of the quarter, but it was not on the line; it was up and down the highway. It was pretty near the east line of the quarter, but
158 did not extend clear down to the south line by several rods, I think; and after we built one fence we took this fence

down. A portion of this land on the north and east side of the Floyd was enclosed before we commenced our work there. When we built our fence the road was laid on the section line and we left half of the road out and we built our fence up to the fence that was on the north of this quarter, being on section 22. I think there was also there some posts and some wire strung across to enclose a field inside of this old fence, and there was some cultivated land in that enclosure before we commenced our fence and at the time. Hughes was cultivating that spring there. When we got our fence built we turned out all stock there was in there. These squatters I speak of were on west side of the river, or southwest quarter of the section, south and west of the river. There is about thirty or forty acres on west side of the river, and no squatters that I know of north and east of the river. Some of these squatters were on the south side, east of the river, facing and fronting Seventh street, and some on west line and some that were back from the line. I cannot tell just how much each occupied, but described them in the leases as best I could; and sometimes they had temporary fences and I described them by those. All were on the west and south side of the river; most of them on Seventh street and Clark street, on south and west side of the tract. Mr. Foley's lease was from spring of 1883 to April 1, 1885. It was made in 1883. The reason that all the leases were not made out in 1882 was because I did not get around to it. I can't tell certainly what year it was they came to my office for leases. I think they came both in 1882 and 1883. When I made this lease with Hughes, in fall of 1882, he was cultivating or occupying some of the tract on the east side of the river. I don't know how much he was using. Hughes never paid me anything. I think Hughes told me then that he was on there under some verbal agreement with Hedges. I did not know what Hedges' claim was. I knew there was a fence on the east side, and knew by common rumor only that it was
159 Hedges'. Hughes did not tell me that he had a lease from Hedges. I think I told Hughes he could have it for the next year if he would execute a lease, and nothing of the kind came up until I wanted him to sign a second lease and then he began to play double and run around to see Joy, and I told him to get off. I did not exact any rent from him because he said he had paid when first lease was signed. At the time we constructed our fence in 1883 Hughes had some crops planted there north and east of the Floyd, and there was corn up there and potatoes. I don't recollect that at the time I tore down the fence that separated the pasture from the cultivated land that Hughes and his hired man were there cultivating this piece. I told Hughes to go off and take everything with him and I would not allow him to come back. I had taken down a portion of this old fence to build the new one and taken down the temporary fence around the cultivated field, and when I was served with the temporary writ I rolled up what wire I had taken down from the old fence and brought it away. I never allowed Hughes to occupy these premises after service of the injunction. I had him out before and kept him out after. I had

placed men down there to keep charge and possession of the premises before the service of the writ, and I told them to stay there and act as they had been when I was served and to stand and maintain the position of things as they existed when the writ was served. I instructed them to not to allow Hughes or his family to cross there before the writ was served. I don't recall that I gave the same instructions after the writ was served. After the services of the writ I never allowed Hughes to occupy the premises; after the service I maintained the attitude of a proprietor and the relation of my clients and myself to the property just as it was when writ was served as near as I could.

I knew in the spring of 1883 that there was a fence enclosing a portion of this land north and east of the Floyd, but I did not know whose it was. I think before I built my fence I went to Hedges and told him if that fence was his and he wanted to sell it
160 that I would buy it. I say the fence was reported to be Hedges'. He said he did not have any fence to sell; he did not say he owned the fence. This was about the time I began to fence. I leased all the land on east side of the river to Graham, except the plowed land, in June, 1883, and Graham turned in his stock after we had fence built. This was before we tore down the fence around Hughes' crop. Graham threw up his lease latter part of June or early part of July, 1883. I cannot tell whether it was before or after the writ was served. It is possible that the lease of this piece east of the river, after Graham threw up the lease, was made to Storey after writ was served. I did make leases after injunction was served. In 1883 there was no assertion of any rights against my possession in favor of any other landlord till Joy came there and forbid me building the fence. I never knew anything about the claim the plaintiff made to the property until the suit was commenced.

Redirect examination:

I never had any knowledge of plaintiff making any claim to that property that I can now recall until the suit was commenced. I don't remember that Joy forbid me or made any demand in the name of plaintiff. So far as I had known about any adverse claim, I supposed it was the Iowa Falls and Sioux City Railroad Company. I had never looked at the title to see what conveyance had been made. There was no adverse claim made by anybody as landlord to me, adverse to defendants, and I took possession without opposition from anybody up to the time Mr. Joy forbid me. Graham wanted a lease and went into possession and put some stock in the enclosure that we made, and before he signed a lease the stock had been turned out by some one and he put to trouble, and he did not want to take a lease, and I allowed him to throw it up, and I then leased it to Storey.

Q. What was the position of Mr. Hughes as to the land in 1883?

(Objected to as incompetent, immaterial, and calling for an opinion and not facts.)

161 A. Hughes had taken a lease from me for a portion of these premises in 1882, which I have introduced in evidence, which expired April 1, 1883. He came to me several times before its expiration and wanted to have the premises for 1883, and I told him he could if he signed a new lease, and he said he would, and it run along that way some time. I prepared a lease for him and he refused to sign it, and I told him he could not have the premises and made him get off, and this is the lease I prepared for him to sign and have offered and introduced in evidence as Exhibit "68."

(Objected to by defendant for the reason that lease was never signed by Thomas Hughes, and incompetent and immaterial.)

(Exhibit "68," so offered and introduced by defendants, is a lease made out in 1883 by defendants to Thomas A. Hughes for part of land on east side of Floyd, but not signed by Hughes.)

After the service of the writ of injunction in this case I studiously endeavored to maintain the exact position I was in and the property was in at the time of the service—not to part with anything nor to take anything prohibited, and have maintained that position ever since. Mr. Hedges never said a word to me about my taking possession of premises over him or what I done with the fence, and never made any claim to me that he was in possession or about the fence. The fence that was on the east side of the Floyd I took up and tore down and laid it outside the fence that defendants built and left it. I don't know what became of it.

Hughes kept wanting to have those premises for 1883 and promised to sign a lease, and it run along. I wanted the grass land outside of the plowed field and Hughes only wanted the plowed land, and I was going to take down a fence and put it so it would en-lose only the plowed land if he would sign a lease. I had got a part of it down when he disclosed to me that he was not going to leave, and I then made him get off the premises and take everything he had, and that day or the following the writ was served and I let the fence lay where I had taken it down preparatory to resetting

162 it. I constructed a fence around this quarter section first as a solid fence, leaving no place to go through. This was unsatisfactory to the people and I went along and opened gates for them. I continued, I think, the use of the east side in 1884 with Storey. In 1884 I let the nursery folks use a portion and Dillon under verbal leases. There has been no interruption with my possession since, except so far as the injunction has interfered.

Recross examination:

I have called Sioux City my home since 1857. I think I never examined the transfer book as to this land until this suit was commenced. In all our proceedings at Washington we were always confronted with the railroad company. The grant was made to the State of Iowa for the purpose of constructing a road from Dubuque to Sioux City. There was a grant, but the State never granted it to the Iowa Falls and Sioux City Railroad Company; this is what I mean and is my sworn opinion. No claim made to this land while

I was in possession in 1882 or 1883 to me. I kept men on the property awhile to prevent trespasses. I did not investigate specially to see who had made these improvements north and east of the Floyd that I found there. I went to Hedges to buy this fence because I heard said it was his. I heard Hughes say he rented from Hedges in 1882; for the very year that I took my lease with him. I did not inquire of Hedges as to what his rights were. After the services of this writ I still continued in possession of these premises, as near as I could, just as I was before. The leasing of the premises east of the Floyd to Storey after the service of this writ I did not regard as infringement of the injunction. I have continued the possession of the premises since the service of the writ the same as before. I did not understand the injunction as ordering me to leave the premises. I was acting in all these proceedings for all the defendants. I knew that Graham turned his stock in on these premises. I think Graham had given up the premises before I took down the fence around the plowed ground. I am not positive about that. I knew that the stuff growing on that plowed
163 ground in 1883 did not mature, because the injunction proceedings stopped me from completing the fence I was about to build around the crop. I knew that Hughes had planted something there and I know that I gave orders not to let Hughes go onto these premises, and cattle were turned in there and this crop was destroyed, I think, after the service of the injunction.

Redirect examination:

My understanding as to the improvements on the east and north side of the Floyd was that plowed land had been made by any one who wanted to plow a little and crop for years without consent of anybody—just squatters' rights—and I never knew that Hedges had any other than squatters' rights there till this suit commenced, and those on the south and west side of the creek I supposed and understood were squatters, and so treated them when I commenced taking leases.

I did not try to confiscate any one's property, only to have possession and control of the premises for defendants. I have had the whole management of the property here for the defendants since I became attorney.

GEO. W. KINGSNORTH (called for defendants) says:

I reside in Sioux City, and have since summer of 1858. In 1858 I lived in east part of the city; went there in fall of 1858, and lived there in summer of 1859. I know the land in suit. While I was living in east part of the city, in 1858 and 1859, I lived the distance of one lot and width of a street from the west line of this tract. In 1858 there was a house on it. Shearer and I bought it of Bosler and moved it off in fall of 1859, and moved it onto the corner of Wall and Seventh street-, in Sioux City.

Cross-examination:

I moved to east part of the city, to the point before stated, in

fall of 1858. There were no other improvements on this tract but this house that I knew of then. This house was what was called a "balloon frame"—boards up and down—about 20 x 16. No windows in it then, but there had been; no chimney, and never had been; not plastered, and no floors in it then, but there had been
164 one floor; it was one story; built of cotton-wood. During the time I lived there there was no other improvements on this land.

And the foregoing was all of the testimony, evidence, exhibits, and documentary evidence offered and introduced by the parties to this suit, and the same is all contained in this abstract; and, within six months after the judgment was rendered in said cause, to wit, on the 7th day of September, 1886, Hon. C. H. Lewis, judge of the fourth judicial district of Iowa, before which court said cause was tried, signed and certified to all the evidence in said cause offered and introduced therein, together with all the exhibits and documentary evidence, as required by law, and the said abstract is taken from the evidence and exhibits so certified as aforesaid.

It was also agreed by written stipulation that parties hereto might withdraw any original exhibits offered and introduced in evidence and substitute true copies, and the copies so substituted are true copies of the originals so introduced.

The final evidence in said cause was submitted to the court at the March term, 1886, and said cause finally submitted to the court on the 12th day of March, 1886, and taken under advisement by the court; and on the 27th day of March, 1886, it being at said March term, 1886, of said district court of Woodbury county, the court rendered its

Judgment and Decree

in said cause, adjudging and decreeing that plaintiff was not entitled to the relief demanded, and that defendants are entitled to the relief demanded in their cross-bill and counter-claim; that plaintiff's bill be dismissed; that the defendants are the absolute owners in fee of the premises in controversy in following proportion—that is, the defend-
ant Griffey one undivided quarter part thereof, the defendant
165 Chamberlain one undivided quarter part thereof, the defendant John M. Tredway one undivided quarter part thereof, and the defendants Curtis, Earle, & Burdette one undivided quarter part thereof—and that the title of said defendants to said land in their respective interests be granted and confirmed against the adverse claims of all parties claiming by, through, or under the plaintiff, and that plaintiff be barred of all interest therein and their pretended title adjudged null and void, and that defendants have and recover costs of suit.

(To all of which decree and each part thereof plaintiff at time excepted.)

On the 11th day of September, 1886, the plaintiff served on the defendants and the clerk of the said district court

Notice of Appeal

to the supreme court of Iowa, and the same was on the same day filed in said district court, and said appeal duly perfected.

Assignment of Errors.

Appellant says that there is manifest error on the face of the record, in this:

1. The court erred in dismissing plaintiff's bill and refusing plaintiff the relief prayed and demanded.

2. The court erred in rendering a decree for defendants on their cross-bill or counter-claim and decreeing plaintiff barred of all interest in the land in controversy.

JOY, WRIGHT & HUDSON,
Attorneys for Appellant.

On the 9th day of June, 1887, the appellant filed, in connection with a transcript, three maps, and said maps were considered by the court in the determination of the cause. Said maps are transmitted herewith as a part of this return and are marked respectively as "12748 A," "12748 B," "12748 C."

(Pp. 166 to 170, incl., omitted, being index to abstract. See general index.)

171 On the 10th day of June, 1887, the appellant filed in the office of the clerk of said court an amended abstract, the same being in the words and figures following, to wit:

172 In the Supreme Court of Iowa, June Term, 1887.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY, Appellant,
vs.
THOMAS L. GRIFFEY *et al.*, Appellees.
} In Equity.

Appeal from Woodbury district court.

Appellant's Amendment to Abstract.

Joy, Wright & Hudson, attorneys for appellant; O. C. Tredway & George Earle, attorneys for appellees.

For the purpose of correcting some of the misstatements and errors in appellees' additional abstract, which confuse and might mislead the court as to the contents of the transcript, appellant files this amendment to its original abstract.

In appellees' additional abstract it is erroneously sited that
173 the location of the line of road from Dubuque to Sioux City was completed August 15, 1886, and that the Tete des Mort Branch was completed August 16, 1886. The respective dates should be August 15, 1856, and August 16, 1856.

In reference to Exhibit "1,000," introduced by plaintiff, the record

discloses that appellant made the following application for permission to introduce the same:

STATE OF IOWA,
Woodbury County.

SIOUX CITY & IOWA FALLS TOWN LOT AND LAND COMPANY
vs.
THOMAS L. GRIFFEY *et al.*

Now comes the plaintiff in the above-entitled cause and a motion makes that it be permitted to introduce in evidence a certified copy of the acceptance of the land grants of 1856 made to the Dubuque and Pacific Railroad Company and filed in the office of the secretary of the State of Iowa. Said certified copy is hereto attached.

Said motion is made upon the ground that this proof was inadvertently omitted by the plaintiff at the time its testimony was introduced in said case, and in support of this motion the affidavit of Wm. L. Joy is filed herein.

JOY, WRIGHT & HUDSON,
Attorneys for Plaintiff.

SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY
vs.
THOMAS L. GRIFFEY *et al.*

I, Wm. L. Joy, do solemnly swear that I am a member of the firm of Joy, Wright & Hudson, who are the attorneys for the plaintiff in the above-entitled cause, and that I have charge of the said case for the plaintiff and introduced the testimony on its part; that the testimony has been taken at different times during the last term of this court and during the present term; that I omitted to introduce the proof of the acceptance of the grant by the Dubuque and Pacific Railroad Company and did not notice said omission until
174 after the testimony had been introduced; that upon learning of the omission I immediately procured the attached copy of the record from the office of the secretary of state of Iowa. I do further state that the omission to introduce said proof was an oversight, and I now ask permission to introduce the said record.

WM. L. JOY.

The foregoing affidavit was subscribed and sworn to before me and in my presence by Wm. L. Joy on this 18th day of March, 1886.

Witness my hand and notarial seal the day and year above mentioned.

[SEAL.] A. L. HUDSON,
Notary Public in and for Woodbury Co., State of Iowa.

Filed March 24, 1886.

Acceptance of the Land Grant by the Dubuque and Pacific Railroad Company.

Office of the Dubuque and Pacific Railroad Co.

DUBUQUE, *July* 17, 1856.

At a meeting of the board of directors of this company held this day the following resolutions were unanimously adopted:

Resolved, That the Dubuque and Pacific Railroad Company assent to and accept the provisions of an act enacted by the General Assembly of the State of Iowa and approved July —, 1856, entitled An act to accept of the grant to carry into execution the trusts conferred upon the State of Iowa by act of Congress entitled An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of railroads in said State, approved May 15, 1856.

Resolved, That the president and secretary of the Dubuque and Pacific Railroad Company be, and they are hereby, required to affix their signatures to the above resolution- and have the same filed in the office of the secretary of the State of Iowa forthwith.

Attest: J. P. FARLEY, *President.*

[SEAL.] H. P. LEECH,
Sec. of D. & P. R. R. Co.

(Record "A" of Incorporations, p. 150.)

175 UNITED STATES OF AMERICA, }
State of Iowa. }

I, Frank D. Jackson, secretary of state of the State of Iowa, do hereby certify that the attached instrument of writing is a true and correct copy of the acceptance of the land grant by the Dubuque and Pacific Railroad Company as the same appears of record in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Iowa.

Done at Des Moines, the capital of the State, this 16th day of March, in the year of our Lord one thousand eight hundred and eighty-six, of the Independence of the United States the one hundred*th* and tenth and of the State of Iowa the fortieth.

[SEAL.] FRANK D. JACKSON,
Secretary of the State of Iowa.
D. W. SMITH, *Deputy.*

I certify that no date of filing of said acceptance appears on the record thereof, but from the whole record I conclude it was filed soon after it was executed.

Filed March 24, 1886.

Upon page 270 of the transcript is the following certificate, to wit:

In the District Court of Iowa in and for Woodbury County.

SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY
vs.
THOMAS L. GRIFFEY *et al.*
} Certificate.

I, C. H. Lewis, sole judge of the district court of the fourth judicial district of Iowa, do hereby certify that the above and foregoing is a full and complete record of the testimony which was offered and introduced in evidence on the trial of said cause; that it contains all of the testimony which was introdueed or offered to be introduced upon the hearing of said cause in the district court of Woodbury county, Iowa; that it correctly shows the maps and exhibits introduced in evidence or offered to be introduced and the
176 manner in which said exhibits were identified; and I further certify that when the original exhibits offered in evidence were withdrawn and a copy substituted in place thereof that the copy is a true and exact copy of the original so introduced and withdrawn. Dated September 24, 1886.

C. H. LEWIS, *Judge.*

Appellant denies the abstract of the testimony of Thomas L. Griffey, of Wm. B. Tredway, and O. C. Tredway made by appellees is correct, and insist- that the same as abstracted by appellees is deceptive and misleading, and that appellant's abstract of the testimony of said witnesses is a full, true, and complete abstract of said testimony.

JOY, WRIGHT & HUDSON,
Attorneys for Appellants.

On the 1st day of June, 1887, there was filed in the office of the clerk of said court by the appellees an additional abstract, the same being in the words and figures following, to wit:

177 In the Supreme Court of Iowa, June Term, 1887.

THE SIOUX CITY & IOWA FALLS TOWN LOT AND LAND COMPANY, Appellant,
vs.
THOS. L. GRIFFEY, CHAR-ES CHAMBERLAIN, O. C. TREDWAY, John M. Tredway, Wm. W. Curtis, George Earle, and Samuel S. Burdett, Appellees.

Appeal from Woodbury district court.

Appellees' Additional Abstract of Record.

Joy, Wright & Hudson, attorneys for appellant; O. C. Tredway and Geo. Earle, attorneys for appellees.

178 *Additional Abstract of Appellant's Evidence.*

T. J. Stone's evidence.

I never saw any stakes near the city. The road built varied at different places; from the preliminary line at different places quite a considerable, in fact; in the lower part of the Floyd valley considerably to the west.

I noticed no stakes on the preliminary survey further south than the Plymouth county line. I only knew who the surveyors were by report; had nothing to do with the work. Some places twenty-five miles north of here the built line varied four and five miles from the preliminary line.

Ex. 12 of Plaintiff's Evidence,

being a map of line of road from city of Dubuque to Sioux City, shows the preliminary work of locating the line of railroad from Dubuque to Sioux City commenced in July, 1855, and completed August 15th, 1886, and the Tate des Mort Branch August 16th, 1886.

The certificate on this map by the Commissioner of the General Land Office does not show by whom it was filed in his office.

The certificate of the railroad company attached to this map purport- to have been made Sept. 27th, 1857.

The certificate of the governor to this map shows the same was filed in his office October 2d, 1856.

Ex. 21 of Plaintiff.

Article 1. John I. Blair and others associate themselves together as a corporation under and by virtue of and claim the right as such corporation arising under title 10, chapter 51, of article 1 of the Revision of 1860.

Article 2. The principal business of the corporation is the buying, holding, improving, and selling town lots in the State of Iowa, and especially along the line of the Iowa Falls & Sioux City railroad.

Article 3. The capital stock shall be $500,000.

Article 7. The business of the corporation to be managed by a board of directors of eleven. The board shall be stockholders
179 and hold office for one year and until their successors are elected, and John I. Blair, William W. Walker, De Witt C. Blair, Clarence G. Mitchell, Horace Williams, Frederick Nickerson, Prince S. Connell, Wm. T. Glidden, Wm. B. Allison, Joseph Jackson, and S. L. Thorndyke shall constitute the first board and hold until their successors are elected.

Ex. 1,000.

The date of certificate is four days after the close of the trial of the case (see Abstract, p. 78), showing it first with the case at least five days after close of trial.

Appellees call the attention of the court to the Appellant's Abstract, p. 118 and 119, on this point for the purpose of showing that such ex. should be excluded from the record, it having been objected to by appellees, as shown by the record.

Ex. A 3

is a map of a section of the Dubuque & Pacific railroad.

The certificate of the Commissioners of the General Land Office attached to this map certifies that this map "shows a section of a map filed in this office by B. Henn."

The certificate of the governor is dated October 2d, 1856.

The purported certificate of the railroad company is dated Sept. 27th, 1857.

Ex. A 4 and Ex. 40 are the same map.

The certificates of the two secretaries of state simply show that on Dec. 14th, 1871, and Nov. 13th, 1885, such a map was on file in the secretary of state's office.

Additional Abstract of Appellees' Evidence.

Abstract of T. L. Griffey's evidence.

I am the Thos. L. Griffey named as one of the defendants. I know the land in controversy; first knew it in 1852; knew the land first as distinctive premises in 1854. I am the same person who pre-empted this land. I settled upon this land for pre-emption purposes July 19th, 1856. I then built a house upon the land of pine boards 14 x 16 feet, one story, with two rooms, floors of same lumber laid on scantling of pine 2 x 4. This was all the kind of lumber in the country at that time; house covered with pine
180 lumber. I also had from one-half to one acre of ground broken at same time; breaking was near the Floyd river. I was then a married man, and I moved onto the land the latter part of August or first of September, 1856, before I proved up, and was living there when I proved up, which was Sept. 5th, 1856. That fall I had a very sick child of about two years old, and I moved to where Feldenheimer now keeps store in Sioux City and wintered there. That winter was a very severe winter, and we could not get to the woods for wood for fuel on account of deep snow, and I hauled the lumber of this house to where I lived and used it for fuel.

In the fall of 1856, while a saw-mill was being built at Sioux City, and while my first house was upon the land, I gave an order for a bill of lumber to build another house upon the land, but was not able to get this lumber till late in the fall—too late to build. Some was hauled onto the land in the fall and some remained at the mill until spring. In the spring I had a house built out of cotton-wood and pine lumber. That was the spring of 1857. This was a cotton-wood-lumber house and is in town here yet. It was built with boards up and down, and was covered with shingles, and was a story and one-half high, with two rooms large enough for my family, con-

sisting of myself, wife, and two children. The house had floors in it. This house was near the southwest corner of the land—west and a little north, as I now remember, of the place where the first house stood. As near as I know, this house remained upon the land about two years. I only know by what I have been told what became of this house. It was removed from the land by some one without my consent or permission.

I have never surrendered my right to this land. I have never received any written notice from the land office of the cancellation of my pre-emption claim to this land. I heard of its suspension from a land-office clerk. After I learned of the suspension of my pre-emption, in 1857, I first consulted Judge Hubbard relative to the matter, and he said he would attend to it and see what could be done, but nothing was done until the spring of 1858, when Ezra Millard, who then lived at Sioux City, was sent to Washington by Woodbury county in the interest of its swamp-land matter,
181 of which this land was a part. I employed him to look up the matter and do what was necessary. He employed Richard M. Young in Washington, and he corresponded with me regularly relative to the matter till about the time of his death, which was, I think, in about two years. I gave him all my papers necessary for him to proceed in the matter. After Mr. Young's death, in 1859, I went to Colorado, and while there had a letter from Mr. Ezra Millard, and he told me he was going to Washington and he would do what was necessary further. That was in 1860.

I have, through Dr. Graff, employed Samuel V. Niles to look up the matter. He was a son-in-law of Richard M. Young, before employed by me.

The next year Col. E. S. Shorter, who was then, I believe, a member of Congress, was here, and I had business with him, and I employed him to look up the matter, and he did so and wrote me from time to time. I had John Taff, who was a member of Congress from our State (Nebraska), looking up the case. He somewhere about 1858 to 1870 introduced a bill in Congress for my relief. Previous to that time had also employed, through Mr. Graff, S. A. Pugh, of Washington. The bill in Congress failed; then employed Tredway, Curtis, Earl, and Burdett; can't say when that was. They have been in the case ever since. Since pre-empting this land I have always claimed the possession of it, and been in actual possession much of the time.

Some time in 1868 I spoke to P. W. Prichard and got him to go onto the land. Just how long he remained there I can't say, but for a number of years. I received a letter from Mr. Pugh, saying I must take actual possession of the land in 1867, and it is from that fact that my memory runs as to speaking to Mr. Prichard and my arrangement with him. Mr. Prichard was to have the use of the ground for his house, and a plat of ground he was to have also. There were no other improvements upon the land at that time.

After I had retained Messrs. Curtis, Earl, Burdett, and Tredway they were intrusted with the management of the whole affair, pos-

session and control of the land as well. I had no knowledge
182 of any one claiming adversely to my title. I know of the
improvements put upon the land by defendants in 1882 and
1883; land then surrounded by posts and wire fence by defendants; also had a barn on land, and there were several squatters there by our permission.

Cross-examination:

I know the position of the land relative to town lot in 1854. It joins Central Sioux City on the south. I commenced my pre-emption improvements July 19th, 1856; think James Haughey assisted me in making settlement.

Think I was living in small house of Dr. Cook's, west of Perry creek, at time made settlement. I had moved to Sioux City before that time. The breaking was done pretty soon after laying foundations. The breaking was on a high piece of ground back of a slough near the creek. I put in some turnips on breaking previous to my proving up—turnips planted soon after filing. Breaking was never inclosed; nothing then to inclose against. I never cultivated it after first season. The next season I was advised to take my child South, and went to Kentucky with it until September, when it died. I returned in September, 1857; think I remained in pre-emption house with my family from three to five days; then, on account of the children, moved out and went to hotel in Dr. Cook's house. I bought the house on the corner I spoke of, where Feldenheimer keeps store, very late in the fall to live in through the winter. I remained on the land longer than my family did on account of the disease—the difficulty that finally killed my child—lung disease; took the pre-emption house off late. The weather was cold. It was more than a month after proving up; can't tell how long. I let the house stay there late. The snow and inclement weather came early that year, and I got house away to save it. Lumber was then an important item in this country, especially pine lumber, which cost $120 per thousand, as that did. I built the second house in the spring of 1857; think in May; did not live in this second house. I boarded in Sioux City, and my wife went to Kentucky with our child, and I went there in August. The residence on the premises in the fall of 1856 is my only residence upon the land; think I
learned of my entry being cancelled some time in July, 1857;
183 made no improvements upon the land after cancellation till the
last few years; can't say who were my witnesses in proving up. The house built in spring of 1857 was built of cotton-wood lumber and was a story and one-half high. The upper part of the house was planned for a store-room. I think some one lived in it. I learned that Bosler sold it. Bosler was in no way connected with me. I suppose he did it for the plaintiff. When I first learned of it I supposed he was working in the interest of the railroad company, but I infer now he did it on his own account; don't remember as the house was occupied by my permission. Bosler was my friend, and I didn't think he would plunder me; that was why I thought he was working for the railroad company. The house was taken

away in 1858 or 1859. When I learned of the cancellation I had an outstanding contract for the digging of a well on the land with one Connerford.

Was not in Sioux City at the time surveyors commenced surveying railroad lines. I knew a party of surveyors had been in Sioux City, but I gave it no attention. I continued to live in Sioux City till the fall of 1857 or spring of 1858; since then have resided in Nebraska. I know very near where the house was located which was traded to Shearer.

Chamberlain had no interest in this land until I deeded an interest to him; think Pritchard went onto the land in 1868 or 1869; think he had a house; think Chamberlain so told me, and that we could get him to occupy land with little expense. There was no other house there that I remember of when Pritchard went to live there; think the house of Pritchard was located southeast of the depot, never knew of an inclosure on the east side of the river until after I obtained my patent. I never abandoned my right to this land. I was fighting for it all the time I had, with all the power I had, and never gave it up for a moment. I know I gave several persons permission to do things on the land. I recollect giving Thomas Green permission to make brick upon the land; also gave others permission to do things thereon.

Don't think the arrangements with Prichard was in writing; think I learned of the cancellation from the clerk in the land
184 office, or possibly from the register or receiver, but never received any written notice from the officers of the cancellation. I declined to make application for return of my warrant and money, and told officer I should not make such application. I never made application for warrant or money. The Government has a 120-acre warrant of mine and $50 in gold unless they have donated it to some one.

Mr. Pugh was an attorney of Washington. Mr. Taffe was Congressman from Nebraska. Mr. Shorter was a Congressman from Alabama. The bill in Congress was tryed to be passed while Taff was in Congress. Mr. Pugh and Mr. Taff were working together to pass the bill. I had some other attorneys at Washington at one time whose names I cannot give; never knew of Hughes or Hedges occupying the land. The corn I saw I understood Doss put there at his own instance. If I saw fences then I suppose they were Doss's. I entrusted matters here largely to Mr. Chamberlain, who lived here. I never took any other pre-emption; never filed on any other land for pre-emption purposes. I knew the land had been claimed in behalf of the railroad company. I didn't know they were making any further claim to it, anyway, but I supposed the matter was in abeyance at Washington. There was a caviat filed in Washington in my interest, and I was informed that another one was filed there for the company, and I suppose they just stood there.

Redirect examination:

The first house I built cost me $200.00. My lumber cost me $120.00 per thousand.

After I had made proof of settlement and entered my land I moved into town on account of the sickness of my child, of which I have spoken. The second house was built before I knew of cancellation, but was not quite finished, and I did not finish it on account of the cancellation. The second house cost $365.00. I have a letter from Mr. S. V. Niles, which I produce as Exhibit 25.

This exhibit shows the employment of Judge Young, of Washington, D. C., as attorney to protect Mr. Griffey's interest in the land in controversy. See Transcript, p. 402.

185 Recross-examination:

The first house contained over 1,300 feet of pine lumber. There were two windows on the south; one door. I removed this lumber off land, burned part of it up as stated and used the rest in other house. Since yesterday I recollect of some one going into second house to live, but don't know who. I had cook stove in first house when I lived in it; it was much the best pre-emption house I had known of at that time, except Dr. Cook's.

Redirect examination:

I came into Woodbury county as early as 1852. I organized the county; was then organizing sheriff; have always lived in locality since 1852; now live in Nebraska, about five miles from Sioux City; lived there since 1861; lived in Covington, just opposite Sioux City, up to that time. Up to the time I had stroke of paralysis was practicing law; was admitted to practice law in 1856 or 1857 here in this court.

W. B. Tredway's Evidence. Additional Abstract.

Direct examination:

Griffey's pre-emption cabin was better than most others, being of sawed lumber.

Cross-examination:

Think the claim cabin remained there all fall and winter. My recollection is that after Griffey had pre-empted he the next season built quite a house and moved in and lived there for some time.

Abstract of O. C. Tredway's Evidence.

I am a resident of Sioux City and have resided here since May 4th, 1857; am acquainted with T. L. Griffey and knew Geo. W. Chamberlain in his lifetime; knew Chamberlain in 1857, and think have known Griffey since 1858; know the land in suit and have known it since 1858; have been engaged in the practice of law since I have lived in Sioux City. I know of
186 improvements being upon this land as early as 1858. There was then a framed house, or a house made of sawed lumber, situated upon the southwesterly corner of this ground, known at that time to me, and I understood it to be generally known as the

Griffey quarter claim house or pre-emption house. It was a story and one-half house, built of sawed lumber, shingle roof; think siding was nailed up and down, not clapboarded; think this house remained there until the spring of 1860. I have data by which I fix this date. In the fall of 1859 Charles E. Hedges ran for county treasurer of the county against G. R. McDougal; I opposed Hedges and favored McDougal; bet a town lot on the election with Charles Booge; bet against Hedges and lost. I deeded the lot in payment of the bet to Booge in October, 1859. That house was then said to have purchased ten straight Republican votes which beat McDougal. All of these things are fresh in my memory, and recollect them distinctly, and I think that building was moved off that piece of ground the following spring.

Think I became connected with this case as attorney in winter of 1877 and 1878. I know John Doss; have known him since 1860; was consulted by him or for him on one occasion as to the possibility of his pre-empting this land by reason of his having cultivated a portion of this land, and advised that he could not do it. This was after the war and before Mr. Cleghorn went out of the land office; can't tell more definitely.

After I became attorney for Mr. Griffey and Chamberlain and conferring with my associates, Messrs. Curtis, Earl & Burdett, we presented the Commissioner of the General Land Office an application for the restoration to Mr. Griffey of his right under his original entry of 1856, a copy of which petition I have presented as Ex. 21. (See Transcript, pp. 405 to 409) and (see Plaintiff's Abstract, pp. 148 to 151.) As soon as we made this effort to restore Griffey to his right the Iowa Falls & Sioux City Railroad Company immediately appeared in the case and contested our right to have reinstated Griffey's entry, and filed an argument and brief by W. T. Steiger, which is hereto exhibited as Ex. 28. (See Transcript, p. 410.) Exhibit 28 is dated July 20th to 30th, 1878; by its Ex. F, shows as follows:

187 *Senate Proceedings.*

"March 31st, 1870, Mr. Thayer asked and by unanimous consent obtained leave to bring in a bill (S. 741) for the relief of Thomas L. Griffey, which was read the first and second times by unanimous consent and referred to the committee on public lands. Senate Journal, 2d session, 41st Congress, p. 437.

May 6th, 1870, Mr. Pomeroy, from the committee on public lands, to whom was referred the bill (S. 741) for the relief of Thomas L. Griffey, reported it without amendment, and that it ought not to pass. The bill was withdrawn from the files by Mr. Pugh, the attorney of Mr. Griffey."

In reply to this argument we filed an argument August 13th, 1878, which I produce as Ex. 29, and put same in evidence:

EXHIBIT 29.

WASHINGTON, D. C., *August* 13, 1878.

SIR: On behalf of Thomas L. Griffey, petitioner and applicant for a reinstatement of his pre-emption entry of the N. W. 27, 89, 47, Sioux City, Iowa, and in review and reply to the separate arguments of James F. Wilson and William T. Steiger, Esqs., who appear as attorneys for the Iowa Falls and Sioux City R. R. Co. and who on behalf of that company resist the said petition and application, we respectfully submit the following:

The pending application of Mr. Griffey for reinstatement is based solely on the first section of the act approved 21st April, 1875.

We claim for him that his case, as presented by our application in his behalf, is within the mischiefs for the remedy of which that law was enacted; that the notable persistency with which he has asserted his claim and clung to his estate, evidenced by his appeal for legislative relief made in 1872, as you are reminded, by the citation of the Senate record by Mr. Steiger, though failing then, found in the act of 1876 the response which for near sixteen years he had been seeking. We decline the tender of discussion on issues not involved in the administration by the executive of the remedial act under which we claim a patent such as is tendered us by Messrs. Wilson and Steiger. We accept for our client the notice intimated by Mr. Wilson that the "Sioux City and Iowa Falls Town Lot and Land Company" will contest before the court the validity of the act of Congress under which a patent must be issued to him, and suggest that we shall find there the proper forum before which to make up issues on which there may be discussion and decision as to what constitutes definite location. As to whether or not the "days' work" of subordinates in the field had legal potency to bind by daily measurement the estate of the Union in the public lands and oust citizens of their rights therein secured to them by general laws, or whether, before good for any purpose, these "days' works" must not have passed the scrutiny of some responsible chief, been accepted and adopted by the company employing him, and the whole approved by some agent of the other party to the contract, to wit, the United States, will there have our attention.

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But in the meantime we must continue to insist that the sole duty of the Land Department with respect to the pending issue is to determine upon the record whether Griffey's case is one under the act whose aid he invokes. In other words, the tract of land he claims, being confessedly within the limits of the grant made to the State of Iowa by the act of May 15, 1856, whether the 19th of July of that year, that being the day of the settlement and filing of Griffey, was "a day prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the land office of the district in which such lands are situated." This question the official record settles with clearness and precision and settles for Griffey without room for cavil. The determining facts are as follows:

1st. The act of Congress making a grant to the State of Iowa was approved May 15, 1856. (11 Stat., p. 9.)

2d. On the 10th day of May, 1856, by telegraphic order such lands (and embracing the tract in controversy) as some one seems to have supposed would fall within a grant which might at some subsequent period be made for railroad purposes were withdrawn from "sale or location." (Exhibit A.)

3d. On the 15th day of May (the day of approval of the granting act) the withdrawal contemplated by the telegraphic order
189 of the 10th was repeated by letter of the Commissioner of the General Land Office, receipt of which was acknowledged by the local officers at Sioux City —, 1856. (Exhibit B.)

4th. On the 19th day of June, 1856, the Commissioner, by his letter to the register and receiver at Sioux City (the receipt of which was acknowledged by them on the 3d day of July following), reciting by reference his telegram of the 10th and his letter of the 15th of May, revoked the withdrawal therein contained and advised those officers that "settlements are authorized upon any of the lands thus withdrawn, and rights of pre-emption may be acquired as well to sections which may be odd numbered and within the six-mile limits of the line of the railroads as to the lands so reserved." (Exhibit C.)

5th. On the 19th day of July Griffey made his settlement and filing. (Official Record G. L. O.)

6th. September 5th, 1856, Griffey made his entry and payments. (Official Record G. L. O.)

7th. On the 20th day of September, 1856, the register and receiver were instructed by telegram and by letter not to admit pre-emptions within the 15-mile limits of the grant, the letter informing them that a diagram showing the line of route would be sent them. (Exhibits D and D*d*.)

8th. On 22d October (by letter) the register and receiver were instructed to cease permitting pre-emption entries or locations within the grant limits immediately upon the filing with them of a map of definite location of the road. (Exhibit E.)

9th. On the 7th day of July, 1857, the entry of Griffey was canceled on the ground that the claim was initiated after the definite location of the road. (Exhibit F.)

10th. April 7th, 1863, the tract was approved to the railroad under act of 15th May, 1856.

These being undisputed facts of record, we now have to enquire what status Griffey's claim has under them by virtue of the act of 21st April, 1876. With the second and third recital (telegram of 10th and letter of 15th May, 1856) we have but little concern, save to remark of the telegram that its directions to the register and receiver were an exercise of power without shadow of authority and in plain violation of the law of the land; and of the
190 letter, that though proceeding on the basis of an act of Congress approved on the same day it was written, that it ordered a withdrawal far beyond any authorization found in the law; and, generally, to remark that both telegram and letter are specimens

of the swiftness with which service was tendered railway interests in those days, in disregard of the rights and interests of private citizens, and breeding in part the necessity out of which flowed the act of Congress which we invoke. But granting, for the sake of the argument, that these unauthorized and unlawful and therefore void exercises of power were in fact effective for every purpose that may be found within their recitals or intendments, they can yet cut no figure in the decision of the issues now on trial. We assert no rights dating back to the lifetime of either of these orders.

They were revoked, as already stated in our fourth recital of record facts, on the 19th day of June, due notice of such revocation having reached the local office and been acknowledged on the 3d day of July following. From that day and until the 20th day of October following, embracing the whole period of Mr. Griffey's settlement and purchase, there can be no claim sustained that there was withdrawal or notice of withdrawal of the lands embraced in the grant "received at the local land office." On the contrary, the record proof is that not until the said 20th day of October was any notice of withdrawal dispatched from the General Land Office. It will be seen, therefore, that we choose to rest the case of our client in this proceeding on the fact that at the date of his settlement and filing there was no notice to the local land office of any withdrawal for any purpose which embraced his selection; or stating it in the order of the facts and in the language of the law: On the 19th day of June, 1856, the Commissioner of the General Land Office officially declared that no order of withdrawal theretofore made was any longer effective to restrain or withhold pre-emptors from asserting their right of pre-emption within the limits of the Dubuque and Pacific railroad. On the 3d of July the local officers were duly informed of that decision. On the 19th day of July, in ac-
191 cordance therewith, they permitted Thomas L. Griffey to make his filing, and that such filing so made and afterwards perfected by entry was "a pre-emption entry of the public lands, made in good faith by an actual settler, upon a tract of land of not more than one hundred and sixty acres, within the limits of a land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands were situated." The contrary views urged by the attorneys for the company, so far as they bring under discussion the record facts, in their relation to the act of April 21, 1876, proceed, as we think, upon a wildly erroneous construction of the letter of the 19th June, 1856.

We find that letter referred to as a "supplemental instruction" to the letter and telegram of May, whose purpose was to advise the R. R. that by law pre-emption settlements were permissible up to the time when the lines or routes of the roads are definitely fixed. Impliedly it is denied that that letter had in it either the purpose or force of a revocation or even serious modification of the former orders which it recites. The reason which the Commissioner sees fit to add at its conclusion for the decisive order contained in its body is, in the company's view, the operative portion of the docu-

ment. A single reading of the paper will dispose of this mistake. Clearly that letter was written for the purpose of saying this: "You are advised that settlements are authorized upon any of the lands withdrawn (by telegram of 10th and letter of 15th May), and rights of pre-emption may be acquired as well to sections which may be odd-numbered and within the six-mile limits of the line of the railroads as to the lands so reserved." Mr. Steiger urges: "2. That the supplemental instructions of June 19, 1856, interdicted pre-emption settlements after the definite location of the road, to wit, July 5, 1856." (Argument, p. 2.) This seems intended as an assertion of the view that the local offices were by the letter of the 19th authorized to determine the date of definite location and to make withdrawals accordingly. Pre-emptions, we are told, were interdicted by that letter after definite location. But why interdict
192 unless the fact of time and place on which the interdict rested were furnished or the means and responsibility for their ascertainment put upon the officers responsible for the observance of the interdict? This view cannot stand. The right to give notice of withdrawal belonged to the President by law and was to be exercised by him through the Commissioner of the General Land Office. It was so exercised on the 20th day of October generally and loosely and on the 22d of October conditionally, viz., upon the filing with them of a map of the line of road as definitely fixed.

The whole argument of the company's attorneys, based as it is upon the question of definite location, with all due respect, we insist, fails of any applicability to a case proceeding under the act of 1876. Its vice consists in the fact that it is a restatement against the act itself of the reasons which induced its passage. The law is the expression of the sense of Congress, after some years of agitation and very full consideration, that the acts of the officers of the land department in making disposals of the public domain in obedience to public law and in conformity with the state of the title as known to them and of record at the time bound the United States in favor of the citizen asserting his rights in good faith. That act is a legislative construction directed, among other things, to solving the vexed question of the time and manner of evidencing the date of definite location so as to bind the company, the United States, and the citizen seeking title to public lands, and it reaches and seeks to give force to the view held at the time Thomas L. Griffey made his settlement and entry, and so held and acted upon to the 16th day of February, 1857 (when the Attorney General advised a different view; 8th Opinions, p. 395), that "the filing of the map of definite location evidenced and dated the definitely fixed line;" in other words, that until some definite act of acceptance and approval of the work of the parties in the field had been done by the company binding them to the lines as run and an acceptance thereof in some form by the United States a line so run was only a
193 projected location, which it was within the power of the company at their own pleasure to change or abandon, and therefore not a definite fixing of the line of route—a view of construction eminently just and reasonable and which has gradually been re-

turned to by the United States and now prevails in the adjustment of grants by the Interior Department.

The means provided by Congress for vesting in the settler the benefits intended by their construction is found in the mandatory provision of the act of April 21, 1876, that "patents for the same shall issue."

We have intimated our purpose to refrain from any discussion of the question of "definite location" as bearing on the rights Mr. Griffey now claims. We know of no case, however, which, upon the facts in that particular, could more strongly illustrate the injustice and wrong done by the jugglery of the companies in the matter of their claimed dates of location, and the consequent necessity and justice of the act of 21st April, and the righteousness in this case, if in no other, of issuing to Mr. Griffey the patent the act decrees him.

His entry was canceled on the ground of "claim initiated after the definite location of the road." The company asserted that location to have been made on the 5th day of July, 1856, as evidenced and made certain, to Mr. Griffey's discomfiture, by the first "day's work" of the party in the field, done, as claimed, on that day. Mr. Steiger kindly furnishes us, on page five of his argument, a copy of the plat of that survey, sets up a flag to mark the limit of the work of the day, and unkindly paints it red.

Now, the very truth of the matter is this, that the act of the legislature of the State of Iowa accepting the grant made by Congress was not passed till the 14th day of July, 1856; did not take effect till the 16th day of July; that not until the passage and taking effect of that act was any company designated and vested with power to construct a road under the privileges and conditions of the act of Congress approved May 15, 1856, and that before the designated company (the Dubuque and Pacific Railroad Company) were authorized to take anything by the act of the legislature it was
194 required of them to file with the governor and secretary of state of the State of Iowa their assent and acceptance of the act by instrument under seal and signature of the proper officers of the corporation (laws of Iowa, revision of 1860, page 215). This indispensable condition to the vestiture in them of any interest or right of procedure whatever under the act of Congress could not have been performed before the 16th day of July—probably was not performed for some days at least thereafter—and hence it follows that the pretended work of survey done on the 5th day of July and subsequent days, to and including the 16th July, by whomsoever done, was without authority—national, State, or corporate—bound no one—was notice to none; yet upon that unauthorized act—upon that mere trespass—the land laws are held to have been suspended against citizens invoking their settlement provisions and Mr. Griffey and a number of others defrauded of their tracts and of the cost of the labor and other improvements placed thereon. Now, we seem to be in condition to suggest that the authorities cited by Mr. Wilson, Railroad Company *vs.* Cartright, 21 Wallace, 316, and Shepley *et al. vs.* Cowan *et al.*, 1 Otto, 330, will be no more alarming in the

forum to which we are to be cited under our patent than they are applicable to the pending proceedings.

And this is as far as we care to diverge from our grounds of reliance on the act of April 21, 1876. The significance of the fact that the Iowa act heretofore cited (sec. 6, act of July 16, 1856) required the grantee company to file their map of definite location in the office of the governor and secretary of state and required him (the governor) to officially certify and file such map "in the department having the control of the public land in Washington;" that such official certification was not had till the 2d day of October, 1856, and the approval of the survey and location by the officers of the company was not appended till the 27th day of September, 1856, we leave for discussion and determination in a proper place.

The concluding paragraphs of Mr. Steiger's (p. 4) and of Mr.
195 Wilson's (p. 12) arguments are rather a plaintive appeal against the deprivations they perceive their clients must suffer. "Has Congress the power to vacate our legally acquired and acknowledged title to this valuable tract, situated, as I am just officially informed, within the corporate limits of Sioux City, with the company's depot grounds not upon but quite near the southwest angle?" asks Mr. Steiger.

"If this case is not settled, if it has not been settled for over twenty-one years, and if it is to be reinstated and the land involved awarded to the claimant, it will be quite time for every one who holds a title from the United States to begin to enquire whether or not it is worth anything. It is to be hoped and expected that the department through which the titles of the people are derived will manifest a greater desire to conserve said titles than the granting of the request of the claimant herein will indicate, etc.," says Mr. Wilson; and we are thereupon moved to say that restitution is none the less righteous because the values wrongfully taken and to be restored are large and the time of their unjust enjoyment long. An iniquity was perpetrated against a citizen more than twenty years ago by the executive department of the Government of the United States. It is now apparent that the wrong done was made possible, was resultant from false pretences set up by a party who sought and received advantage from the wrong. Congress has seen fit, upon a full knowledge of the facts made notorious, to so far attempt the correction of the injustice perpetrated by the agents of the United States as to give to its injured citizens the means of compelling the beneficiaries of the fraud to try conclusions in the courts of justice. We cannot share with the learned counsel of the company the apprehension expressed by them that such a meagre exhibition of "quickened conscience" has in it aught of alarm for honest people. We know that the correction of injustice often does entail hardship upon the innocent. Happily in this case it does not so chance. We must confess our belief that if it were the case, that so eager, continuous, and persistent has been Mr. Griffey's struggle for this property that he would have it if it were at some cost to another.

His own struggle against wrong has not left him, however,
196 without sympathy for the woes of others, and we make no

doubt, therefore, that he will read with real gratification, on page 2 of Mr. Wilson's argument, the abstract of title verified by Mr. Van Deventer, showing that such title as may flow from the certification of April 7, 1863, has passed at every step through channels which have been made uncomfortable by his clamor and rests now with the familiars, the second self of the Iowa Falls and Sioux City Railroad Company, the Sioux City and Iowa Falls Town Lot and Land Company.

No; the company's depot grounds are not on the tract; they "are near the southwest angle." The company has always been too well informed to expend anything there, and so has everybody else. It is now within the corporate limits of Sioux City, we are informed by Mr. Steiger, but it remains as tenantless as it was twenty-two years ago, when Griffey made his filing there.

We cite and rely upon the decisions of the Secretary in the cases of Streeter *vs.* M. K. and T. R. R., Copp's Land Owner, 1878, p. 180, March, 1878, and Cedar Rapids and Missouri River R. R. *vs.* Colton, p. 182.

CURTIS, EARLE & BURDETT,
Attorneys for Thomas L. Griffey.

HON. J. A. WILLIAMSON,
Commissioner General Land Office.

Exhibit "A" referred to is Plaintiff's Exhibit 6 of Abstract.
Exhibit "B" referred to is Plaintiff's Exhibit 7 of Abstract.
Exhibit "C" referred to is Defendants' Exhibit 12 of Abstract.
Exhibit "D" referred to is Defendants' Exhibit 13 of Abstract.
Exhibit "Dd" referred to is Defendants' Exhibit 14 of Abstract.
Exhibit "E" referred to is Defendants' Exhibit 15 of Abstract.
Exhibit "F" referred to is Plaintiff's Exhibit 39 of Abstract.

By reference to the argument just read it will appear that J. F. Wilson filed an argument also. After arguments presented were heard at Washington the claim of Griffey to the quarter section was reinstated and patented. Time was then given the Iowa
197 Falls & Sioux City Railroad Company for an appeal, and they defaulted in taking the appeal, and after the lapse of time for the appeal they presented excuses for their default, and were allowed to appeal, and the Commissioner of the General Land Office communicated his decision to us as attorneys for Mr. Griffey, which I have produced and put in evidence, Ex. 30.

EXHIBIT 30.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 13, 1880.

Register and receiver, Des Moines, Ia.

GENTLEMEN: A decision was made in this office in the case of Thomas L. Griffey *vs.* The Dubuque & Sioux City (now Iowa Falls & Sioux City Railroad Company), September 8th, 1880, adverse to

defendant and involving the N. W. ¼ sec. 27, T. 89, R. 47. William T. Steiger, attorney for defendant, admits that he received notice of the decision September 10. September 13th, 1880, the parties entered into a written stipulation in regard to an oral argument before the Secretary, but expressly provided that nothing therein should be "construed to dispense with the usual proceedings or time for appeal or written argument should either party wish to submit such argument." The time for taking such appeal expired November 9, 1880. November 23 Mr. Steiger filed a motion of appeal and a letter in which he states that as early as the first of October he prepared a form of appeal and sent it to his colleague, Hon. James F. Wilson, for his supervision, and relied on Mr. Wilson's answer to call it up again, but he received no answer from Mr. Wilson, and overlooked the time allowed for filing.

November 27, 1880, Curtis, Earl & Burdett filed a paper in which they insisted the time for appeal had elapsed before notice of appeal was filed, and they ask that the case be declared closed.

On the 9th day of December, 1880, Hon. James F. Wilson filed a letter in which he states that about October first he received forms of appeal from Mr. Steiger, to which he made prompt reply, and supposed notice of appeal would be duly filed and rested
198 in that behalf until November 26, when he received a letter from Mr. Steiger, who said he had received no answer from Mr. Wilson, and that no appeal had been filed.

Defendant asks the exercise of that discretion that would guide a court in opening a default occasioned by such circumstances as this case presents. As the oversight by which failure to appeal within the time prescribed was caused by the miscarriage of a letter, and in view of the Secretary's decision in the case of Leona Neips (Copp's Land Owner, Oct., 1880, p. 99) that the department is liberal in the allowance of appeals, the appeal will be allowed in this case. The parties will be allowed thirty days within which to file argument for submission to the appellate authority should they so desire. I will advise the attorneys for the parties in interest of this action.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

Following this appeal the case went to the Secretary of the Interior and patent was ordered to Mr. Griffey, which patent is already introduced in the case. As to my action with reference to taking possession and keeping possession of the land in suit, I took charge of the case here for all parties, as near as I can now remember, early in 1878 or late in 1877. I took possession of the place in connection with Mr. Prichard and remained in possession of it from that time until now for all parties defendants.

After I so took possession of it we caused buildings to be placed thereon; we fenced it up, running a fence from the northeast corner of the quarter section—not directly from the northeast corner of the quarter section, there being a road lying along the east line of the quarter section, one-half of which was taken from this quarter section—we commenced our fence half the width of the road west

of the northeast corner of the quarter section and ran the fence down the line of the quarter, allowing the road to be outside of our fence.

There was also a road on the south line of the quarter section, and we run our fence across the south line of the quarter section, leaving the road outside of our fence.

When we struck the west line we then run the fence north of the Floyd river. We had, before building the fence, a sur-
199 vey made to ascertain where these lines were allowing for the road and set the fence according to our surveys. There being a large number of squatters on this land in 1882, I required them to take leases from Griffey & Chamberlain. In 1882 I leased a portion of the premises to O. P. Anderson, by written lease, which I now offer in evidence as Ex. 31.

Exhibit 31 is as follows:

Lease.

This indenture, made this 18th day of July, A. D. 1882, between Thomas L. Griffey and Charles Chamberlain, parties of the first part, and A. P. Anderson, party of the second part, witnesseth:

That the parties of the first part, in consideration of the covenants of the party of the second part hereinafter set forth, do by these presents lease to the party of the second part the following-described property, to wit:

A portion of the N. W. ¼ of sec. 27, twp. 89, range 47, south of the Floyd river and near Hedges' mill, as now occupied by me by an inclosure, in the county of Woodbury and State of Iowa;

To have and to hold the same to the party of the second part from the 18th day of July, 1882, to the 1st day of April, 1883; and the party of the second part, in consideration of the leasing the premises above set forth, covenants and agrees with the parties of the first part to pay the parties of the first part, as rent for the same, the sum of five dollars, payable as follows, to wit: Five dollars at the execution of this lease.

And the party of the second part covenants with the party of the first part that at the expiration of the term of this lease he will yield up the premises to the parties of the first part, without further notice, in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident and ordinary wear excepted.

It is further agreed by the party of the second part that neither he nor his legal representatives will underlet said premises or any part thereof or assign this lease without the written assent of the parties of the first part first had thereto.

And it is further covenanted and agreed between the
200 parties aforesaid that the improvements upon said lot belong to the said second party, and that he may remove the same at any time during the time of this lease or for thirty days after the expiration hereof.

The covenants herein shall extend to and be binding upon heirs, executors, and administrators of the parties of this lease.

Witness the hands and seals of the parties aforesaid the day and year first aforesaid.

THOMAS L. GRIFFEY, [SEAL.]
CHARLES CHAMBERLAIN, [SEAL.]
By O. C. TREDWAY, *Their Attorney.*
A. P. ANDERSON.

The foregoing lease is renewed and extended from April 1st, 1883, to April 1st, 1884, for the rental of $15.00 for the term of such extension.

April 1st, 1883.

THOMAS L. GRIFFEY,
CHARLES CHAMBERLAIN,
By O. C. TREDWAY, *Their Attorney.*
A. P. ANDERSON.

Received on this lease $3.00 June 15th, 1883.

This lease was extended from April 1st, 1883, to April, 1884, by written extension.

I also leased a portion of the land to Fred. Oleson by written lease, which is offered in evidence as Exhibit 32.

This lease and all following leases are the same as Ex. 31, only differing as to the leasees and the land embraced in the lease and date and time of duration of lease. Exhibit 32 is dated July 18th, 1882, and extended to April 1st, 1883.

I also leased a portion of the premises to James Jacobs by written lease, which I here produce and offer in evidence as Exhibit 33.

Exhibit 33 is dated July 18th, 1882, and extended to April 1st, 1883.

I also leased a portion of the premises by written lease to Carston Johnson, which lease was extended; same offered in evidence as Exhibit 34.

Exhibit 34 is dated July 18th, 1882, and run to April 1st, 1883, and was then extended to April 1st, 1884.

201 I also leased a portion of the premises, by written lease, to Madison Daugherty, and same was extended; offered in evidence as Exhibit 35.

Exhibit 35 is dated July 18th, 1882, and extended to April 1st, 1883, and was extended to April 1st, 1884.

I also leased a part of the premises, by written lease, to Wm. Harris and Anderson Parmler, and same was extended; offered in evidence as Exhibit 36.

Exhibit 36 is dated July 18th, 1882, and run to April 1st, 1883, and was extended to April 1st, 1884.

I also leased a part of the premises, by written lease, to Charles Nelson; offered in evidence as Exhibit 37.

Exhibit 37 is dated July 18th, 1882, and extended to April 1st, 1883.

I also leased a part of the premises to S. Kittenger by written lease; offered in evidence as Exhibit 38.

Exhibit 38 is dated July 18th, 1882, and continued to April 1st, 1883.

I also leased a portion of said premises, by written lease, to M. C. Shappenberg; offered in evidence as Exhibit 39.

Exhibit 39 is dated July 18th, 1882, and continues to April 1st, 1883.

I also leased a part of the premises, by written lease, to Daniel Mangerson; offered in evidence as Exhibit 40.

Exhibit 40 is dated July 18th, 1882, and extended to April 1st, 1883, and was then extended to April 1st, 1884.

I also leased, by written lease, a part of the premises to Peter Nelson, and afterward extended the same; offered in evidence as Exhibit 42.

Exhibit 42 is dated July 18th, 1882, and extended to April 1st, 1883, then renewed to April 1st, 1884.

I also leased, by written lease, a part of the premises to Peter Burns, and afterwards extended the same; offered in evidence as Exhibit 43.

Exhibit 43 is dated July 18th, 1881; extended to April 1st, 1883; extended to April 1st, 1884.

I also leased, by written lease, a part of the premises to Anderson Swanson, and afterward extended same; offered in evidence as Exhibit 44.

202 Exhibit 44 is dated July 18th, 1882, and extended to April 1st, 1883, then renewed to April 1st, 1884.

I also leased, by written lease, a part of the premises to F. A. Hughes; offered in evidence as Exhibit 45.

Exhibit 45 is dated July 18th, 1882, and extended to April 1st, 1883.

I also leased, by written lease, a part of the premises to Charles Rasmuson; offered in evidence as Exhibit 47.

Exhibit 46 is dated April 1st, 1883, and extended to April 1st, 1884.

I also leased, by written lease, a part of the premises to Caroline Bettkey; offered in evidence as Exhibit 47.

Exhibit 47 is dated April 1st, 1883, and extended to April 1st, 1884.

I also leased, by written lease, a part of the premises to M. J. Dillom; offered in evidence as Exhibit 48.

Exhibit 48 is dated April 1st, 1883, and extended to April 1st, 1884.

I also leased, by written lease, a piece of the premises to Peter Jurgensen; offered in evidence as Exhibit 50.

Exhibit 50 is dated April 1st, 1883, and extended to April 1st, 1884.

I also leased, by written lease, a piece of the premises to Patrick Moran; offered in evidence as Exhibit 51.

Exhibit 51 is dated April 1st, 1883, and extended to April 1st, 1884.

I also leased, by written lease, a piece of the premises to M. C. Carig; offered in evidence as Exhibit 52.

Exhibit 52 is dated May 1st, 1883, and extended to May 1st, 1884.

I also leased, by written lease, a piece of the premises to William Slattery; offered in evidence as Exhibit 53.

Exhibit 53 is dated April 1st, 1883, and continues one year.

I also leased, by written lease, a piece of the premises to S. Strader; offered in evidence as Exhibit 54.

Exhibit 54 is dated April 1st, 1883; continues one year.

I also leased, by written lease, a piece of the premises to James Johnson; offered in evidence as Exhibit 55.

203 Exhibit 55 is dated April 1st, 1883, and continues one year.

I also leased, by written lease, a piece of the premises to A. E. Dodge; offered in evidence as Exhibit 56.

Exhibit 56 is dated April 1st, 1883; extended one year.

I also leased, by written lease, a piece of the premises to John Mahan; offered in evidence as Exhibit 57.

Exhibit 57 is dated April 1st, 1883; continues one year.

I also leased, by written lease, a piece of these premises to Peter Clossen; offered in evidence as Exhibit 58.

This exhibit is dated April 1st, 1883, and is extended one year.

I also leased, by written lease, a pieces of these premises to Seth Strong; offered in evidence as Exhibit 59.

This exhibit is dated April 1st, 1883, and extended one year.

I also leased, by written lease, a piece of these premises to Christian Ruse; offered in evidence as Exhibit 60.

This exhibit is dated April 1st, 1883, and extended one year.

I also leased, by written lease, a piece of these premises to Aaron Anderson; offered in evidence as Exhibit 61.

This is dated April 1st, 1883, and extended one year.

I also leased, by written lease, a piece of these premises to J. C. Foley; offered in evidence as Exhibit 62.

This exhibit is dated April 1st, 1883, and extended to April 1st, 1885.

I also leased, by written lease, a piece of these premises to Ole Oleson; offered in evidence as Exhibit 63; is dated April 1st, 1883; extended one year.

I also leased, by written lease, a piece of these premises to Peter Peterson; offered in evidence as Exhibit 64; is dated April 1st, 1883, and extended one year.

I also leased, by written lease, a piece of these premises to Peter Nelson; offered in evidence as Exhibit 65; is dated April 1st, 1883, and extended one year.

I also leased, by written lease, a piece of these premises to James Story; offered in evidence as Exhibit 66; is dated July 1st, 1883; extended to April 1st, 1884.

I also leased, by written lease, a piece of these premises
204 to Dora Maloney; offered in evidence as Exhibit 67; is dated April 1st, 1883; extended to April 1st, 1884.

Besides these leases I have some oral leases outstanding with tenants who were occupying portions of the premises, and the defendants were in possession of these premises by themselves and

their tenants of the dates of these leases, and have continued so in possession up to the present time, and are now in possession, with their improvements and tenants.

In addition to what I have stated about Mr. Doss' attempt to pre-empt this land, Mr. Doss told me that his witnesses for making his pre-emption filing good were Mr. Lambert, Mr. Sloan, and his brother Christ. These were the witnesses he had to prove his settlement.

The defendants were in possession of these premises at and before the commencement of this act by their improvements upon the premises, and nearly all the tenants were on the premises under their leases.

The reason these leases were drawn in the name of Thos. L. Griffey and Charles Chamberlain is that after I had taken possession of the premises for the defendants Geo. W. Chamberlain died, leaving Charles Chamberlain his only surviving heir. I knew this fact, and when I leased I leased in name of Griffey and Charles Chamberlain, at the same time representing Curtis, Earl & Burdett, and Tredway in their interests.

Tredway's Cross-Examination.

I may have known the house on this land in 1857, but I haven't any distinct recollection of it. I used frequently to go up the Floyd to our place on section 11, and I knew where the Griffey quarter was at that time, when it became a question of controversy, and I knew the Griffey pre-emption house that then stood on the claim. It was well known.

That house was said to have been used as wedge-money in politics in fall of 1859.

EXHIBIT 69 OF DEFENDANT-.

DES MOINES, *March* 6, 1868.

The undersigned, of the Iowa Falls and Sioux City Railroad Company, cannot accept of the grant made by the State to
205 this company for the reason that said grant contains an unqualified right on the part of the State to regulate the rates of freight and fare.

We therefore respectfully decline to accept said grant of land.

THE IOWA FALLS & SIOUX CITY RAILROAD CO.,
By PLATT SMITH, *Vice-President.*
W. W. WALKER, *Treasurer.*

To Hon. Samuel Merrill, governor of the State of Iowa.

STATE OF IOWA, *ss:*

I, John H. Gear, governor of the State of Iowa, hereby certify that the foregoing is a correct copy of the original as the same is found in the executive office of the State of Iowa.

Witness my hand and the seal of the State of Iowa this 6th day of May, 1881.

JOHN H. GEAR.

By the governor:
J. A. T. HULL,
Secretary of State.

G. W. Kingsnorth's Evidence.

Direct examination:

The house upon the Griffey land in 1858, bought by Shearer and myself, was moved off the land, I think, in fall of 1859, and was moved onto lot 4, block 44. It is now a part of the former residence of Daniel Kelly.

P. W. Prichard's Evidence.

Direct examination:

Previous to 1871 I had a talk with Mr. Griffey, and he wanted some one to live upon his land—to have possession of it for him—and I moved on there in 1871 and remained there till 1875; had a house there and left my house there till 1878; rented it out from 1875 to 1878. I was there to hold possession of the land for Griffey and Chamberlain. I moved my house off of the land late in 1878.

206 Cross-direct resumed:

I did not know of any one being on the land and claiming it for the railroad company as against Griffey and Chamberlain. I bought the house, fence, and well; all the improvements I occupied.

EXHIBIT 3—DEFENDANTS.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved March 3d, 1855, entitled "An act in addition to certain acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States," there has been deposited in the General Land Office warrant No. 53493, for 120 acres, in favor of Benjamin Cage, private in Captain Martin's company, Alabama militia, Florida war, with evidence that the same has been duly located upon the northwest quarter of section twenty-seven, in township eighty-nine north of range forty-seven west, in the district of land formerly subject to sale at Sioux City, now Des Moines, Iowa, containing one hundred and sixty acres, excess paid, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, the said warrant having been duly assigned to Thos. L. Griffey, in whose favor said tract has been located:

Now, know ye that there is therefore granted by the United States

unto the said Thomas L. Griffey, as assignee as aforesaid, and to his heirs the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Thomas L. Griffey, as assignee as aforesaid, and to his heirs and assigns forever.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be thereto affixed.

207 Given under my hand, at the city of Washington, the thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth.

Seal United States General Land Office.

By the President:

CHESTER A. ARTHUR,
By WM. H. COOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded in vol. 155, page 223.

Certificate Referred to in Abstract, p. 164, *by Appellant.*

I, C. H. Lewis, judge of the fourth judicial district of Iowa, hereby certify that the above and foregoing record as certified to by W. E. Cody, official short-hand reporter of the fourth judicial district of Iowa, shows and contains all of the evidence which was introduced or offered to be introduced during the progress of the above-entitled cause in the district court of Woodbury county, Iowa. It shows what exhibits were introduced in evidence or offered to be introduced in evidence, and the record shows the manner in which said exhibits were introduced. I further certify that when the exhibits referred to therein or certified copies thereof are attached thereto that the above will then embrace all of the evidence that was offered or introduced during the progress of the trial.

C. H. LEWIS,
Judge of the 4th Judicial District of Iowa.

Signed this 7th day of September, 1886.

O. C. TREADWAY &
GEORGE EARLE,
Att'ys for Appellees.

(P. 208 omitted, being index to additional abstract. See general index.)

209 Said cause was duly submitted to said supreme court on the foregoing record, and, the same having been fully considered, said court filed its decision in writing on the 10th day of October, 1887, and the same is in the words and figures following, to wit:

210 "In Supreme Court of Iowa. October 10, 1887.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND CO., Appellant,
vs.
THOS. L. GRIFFEY *et al.*

Appeal from Woodbury district court.

Action in equity to determine the ownership of certain real-estate judgment for the defendants and plaintiff appeals.

Joy, Wright & Hudson, for appellant; O. C. Tredway; Curtis, Earl & Burdette, and John F. Duncombe, for appellee.

SEEVERS, *J.:*

211 The plaintiff claims title to the real estate in controversy under the act of Congress approved May 15, 1856, granting to the State of Iowa lands in aid of the construction of certain railroads in said State, and the act of the General Assembly of the State of Iowa accepting the trust and granting said lands under certain conditions to the Dubuque and Pacific Railroad Company, under whom the plaintiff claims. It will be conceeded the road was constructed and the lands earned, and that the same were conveyed on the 5th day of July, 1871, by the State to the corporation, by whom the road was constructed. The plaintiff claims that the line of the road was definitely fixed when such line was surveyed and staked out upon the surface of the ground on the 5th day of July,
212 1856, and that the rights of the plaintiff's grantors attached at that time thereto. The land in question is situated within the six-mile limit, and was duly certified in April, 1863, by the proper officers of the Government of the United States to the State of Iowa for the use of the corporation constructing the road. The defendants contend that such certification was improperly made, and that no title to the land passed to the plaintiff under the land grant for the reason that the line of the road was not definitely located until October, 1856, when the plat of the road as located was filed in the proper office at Washington city; prior to which time, and on July 19th, 1856, as the defendants contend, the defendant, Griffey, obtained a pre-emption right on said land which he
213 afterward proved up and obtained the usual certificate issued by the local land officers.

The pre-emption entry was afterward, in July, 1857, cancelled by the Commissioner of the General Land Office, because it was supposed to conflict with the railroad grant. Griffey, however, refused to accept the money paid the Government for the land or to acquire in the cancellation, but he contended, with more or less persistency, to claim the land under his pre-emption right, until finally he made application to the proper authorities for a reinstatement of such right and for a patent therefor. There was a hearing before the Commissioner, and from his decision the plaintiff appealed to the

Secretary of the Interior, who affirmed the ruling of the Com-
214 missioner, and thereunder a patent was issued to Griffey on June 30th, 1882. Both parties claim to have been in the actual, open, exclusive, and notorious possession of the land on which the plaintiff or its grantors have paid the taxes ever since it became taxable in 1872. We have not deemed it necessary to set out the acts of Congress and of the State, for the reason that the substance and purport thereof are fully known to the litigants and the profession. It should possibly be stated that immediately after the act of Congress of May 15, 1856, took effect the Commissioner of the General Land Office withdrew from public entry or pre-emption the land in controversy. Notice of such withdrawal was received at the local land office in Iowa prior to July 19th, 1856. But
215 in June, 1856, the Commissioner advised the local land officer that he had made such order by mistake and that the land in question was subject to pre-emption.

1st. The first question to be determined is whether under the railroad grant the right of the plaintiff's grantor attached to the land prior to the 19th day of July, 1856, and this depends on the further question whether the survey of the line of the road made on July 5th, 1856, and staking out such line can be regarded as the definite location of such line as required by the act of Congress, or whether such location should not be regarded as made until the plat of the survey was filed in the General Land Office in October, 1856.

We have reached the conclusion that the mere survey and
216 staking out the road on the surface of the ground is not such definite location as required by the act of Congress, but that such location cannot be regarded as being definitely made until a plat of such survey is filed in the proper office.

We do not deem it necessary to state the reasons upon which this conclusion is based, for the reason that this court is committed to such rule. C., R. I. & P. R. R. Co. *vs.* Grinnell, 51 Iowa, 476; The Iowa Falls & Sioux City R. R. Co. *vs.* Beck, 67 *ib.*, 421. And we think the same rule has been adopted by the Supreme Court of the United States. Van Wyke *vs.* Kuevals, 106 U. S., 360: K. P. R. R. Co. *vs.* Dunmeyer, 118 U. S., 414; Grinnell *vs.* R. R. Co., 103 *ib.*, 739. It follows that the land in question was subject to pre-
217 emption on the 19th day of July, 1856, and that no right thereto passed to the plaintiff's grantor under the railroad grant until after that time; and as Griffey obtained a valid pre-emption right, which he proved up, and has obtained a patent from the Government, he and those claiming under him have the better title to the land in controversy, unless such right is barred by the statute of limitations, which question we proceed to consider.

2nd. As has been stated, the State conveyed the land in question to the plaintiff's grantor in 1871. Such conveyance, we think, was sufficient to give the plaintiff's grantor color of title, and based thereon the plaintiff claims that it and its grantors have been in the actual, visible, notorious, and exclusive possession
218 of the land under a claim of ownership for more than ten

years prior to 1883, when the defendants, with force and violence, took possession of said premises. The evidence as to possession is exceedingly unsatisfactory; but it sufficiently appears that Griffey was in possession for a time during 1856, and that he moved the house built by him from the premises during the succeeding winter. He, however, commenced the erection of another house in 1857, but he never finished it, and it was never occupied by any one, and some time afterward and probably in 1859 it was moved from the premises by some unknown person.

Griffey personally never was in possession except as stated.
219 John Doss heard it was railroad land and took possession of a portion of it in 1861, but such possession was not taken for the railroad company. There is some evidence tending to show that it was adversely to the company, at least for a time, for he made some efforts to pre-empt it. He remained in possession until 1871, when the land was conveyed to the railroad company by the State, and it will be conceded that he then or shortly afterward became the tenant of the railroad company and paid rent for a year and then refused to pay rent, although he occupied a portion of the premises until 1877. After leasing, Doss seems to have reached the conclusion that the land in controversy did not
220 belong to the plaintiff's grantor, and hence he refused to pay rent, as stated, and whether the last two years he was in possession he held such possession for or under the plaintiff or its grantors is doubtful; but, conceding he did, he moved from the premises in 1877 and entirely abandoned the possession thereof. At most he had been in possession six years after plaintiff's grantor had been vested with color of title. About 1869 one Dally, a railroad employee, built a house with railroad lumber on the land, and he moved into the house and remained in possession until 1871.

It is doubtful whether he entered into possession under or for the railroad company, but, conceding he did, he sold the house to Pritchard in 1871 and abandoned the premises. Pritchard moved
221 into the house in 1871, either at the instance of Griffey or for himself, and remained in possession until 1878, when he moved the house away and abandoned the premises. It is not claimed that Pritchard went into possession under or for the plaintiff or those under whom it claims, but it is conceeded that such possession was held adversely to the right of the plaintiff. Hedges went into possession of a portion of the land in 1879 under a lease from the plaintiff, and he sublet to Hughes, who was forcibly ejected by the defendants in 1883. This action was commenced in June, and the answer and counter-claim of the defendants, setting up their title, was filed in November, 1883, so that Hedges and
222 Hughes were only in possession about four years, and it will be observed between the time the possession of Doss terminated and that of Hedges commenced there was a period of about two years; therefore it cannot be said the possession of the plaintiff was continuous. Besides this, Pritchard was in hostile possession of the premises from 1871 to 1878. It also appears that several other persons built houses on and occupied portions of the premises for

several years, and it does not appear under whom they claimed, so that we think that the plaintiff has failed to show by a preponderance of the evidence that it or its grantors have had exclusive possession of the land under color of title for the period of ten
223 years, and therefore the right of the defendants to the affirmative relief granted them by the court below is not barred by the statute of limitations.

Affirmed."

224 And on the same day said court rendered a final judgment against the appellant, the record thereof being in the words and figures following, to wit:

"THE SIOUX CITY & IOWA FALLS TOWN LOT AND LAND CO., Appellant,
vs.
THOMAS L. GRIFFEY *et al.*

Appeal from Woodbury district court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of
225 the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $91.75, and that execution issue therefor."

225½ And afterwards there were filed in the office of said clerk the following, to wit:

Petition for a writ of error.

Writ of error.

Writ of error, bond, and citation.

Tr-e and correct copies of said petition, writ, bond, and citation have been made and remain lodged in the office of said clerk, and the originals are attached hereto and made a part of the return to said writ.

226 Supreme Court of the State of Iowa.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY
vs.
THOS. L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. TREDWAY, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, Late Transacting Business as Land Attorneys in Washington, D. C., under the Firm Name of Curtis, Earle & Burdette.

To the hon. chief justice of the supreme court of Iowa:

The petition of the The Sioux City & Iowa Falls Town Lot & Land Company, plaintiff above named, respectfully show- that in the judgment and decision of the above-entitled cause by the supreme court of Iowa there was drawn in question the construction

of certain statutes of the United States, and the said judgment and decision were against the title, right, and privilege claimed by petitioner under the same.

Your petitioner therefore prays your honor to examine the record in said suit herewith presented and therefor- allow a writ of error in said cause from the Supreme Court of the United States to the supreme court of Iowa, pursuant to the acts of Congress of the United States in such cases made and provided.

JOY, WRIGHT & HUDSON,
Attorneys for Petitioner.

The writ of error as within prayed is allowed this 18th day of November, 1887.

AUSTIN ADAMS,
Chief Justice Supreme Court of Iowa.

226½ [Endorsed:] The Sioux City & Iowa Falls Town Lot & Land Company *vs.* Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, and J. M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette. Supreme court, State of Iowa. Filed Nov. 23, 1887. G. B. Pray, clerk sup. court. 12748.

227 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between The Sioux City & Iowa Falls Town Lot & Land Company, plaintiff, and Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, John M. Tredway, Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, defendants, wherein was drawn in question certain statutes of the United States, and the said judgment and decision were against the title, right, and privilege claimed by said plaintiff under the same, a manifest error hath happened, to the great damage of the said plaintiff, as by their said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding- aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, this the 19th*th* day of Nov., A. D. 1887.

[Seal Circuit Court U. S., Northern District of Iowa, Sioux City.]

A. J. VAN DUZEE,
Clerk of U. S. C. C., Northern Dist. of Iowa,
By J. H. BOLTON,
Deputy Clerk, Western Division.

227½ [Endorsed:] Supreme Court of the United States. The Sioux City & Iowa Falls Town Lot & Land Company *vs.* Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, John M. Tredway, Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette. Writ of error. Filed Nov. 23, 1887. G. B. Pray, clerk sup. court. 12748.

228 Supreme Court of the State of Iowa.

THE SIOUX CITY & IOWA FALLS TOWN LOT & LAND COMPANY
vs.
THOS. L. GRIFFEY, CHAS. CHAMBERLAIN, O. C. TREDWAY and John M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, Late Transacting Business as Land Attorneys in Washington, D. C., under the Firm Name of Curtis, Earle & Burdette.

Know all men by these presents that we, The Sioux City & Iowa Falls Town Lot & Land Company, as principal, and Horace Williams and J. Van Deventer, both of Clinton county, Iowa, as sureties, *and* are held and firmly bound unto the said Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway and John M. Tredway, Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette in the sum of one thousand dollars, to be paid to the said obligees, their executors, and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns, executors, and administrators firmly by these presents.

Sealed with our seals and dated this November 16th, A. D. 1887.

Whereas the above-named Sioux City & Iowa Falls Town Lot — Land Co. have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Iowa:

Now, therefore, the conditions of this obligation *in* such that if the above-named Sioux City & Iowa Falls Town Lot & Land Company shall prosecute its writ to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE SIOUX CITY & IOWA FALLS TOWN LOT & LAND COMPANY,
[SEAL.] By its attorneys, JOY, WRIGHT & HUDSON.
HORACE WILLIAMS.
J. VAN DEVENTER.

229 Signed and sealed in the presence of—
A. R. McCOY.

STATE OF IOWA, } ss:
Clinton County, }

Horace Williams and J. Van Deventer, being duly sworn, each for himself says that he is a resident of the State and is worth more than one thousand dollars beyond the amount of his debts, and that he has property in the State liable to execution to the amount of one thousand dollars and upwards.

HORACE WILLIAMS.
J. VAN DEVENTER.

Subscribed in my presence and sworn to before me, the undersigned, a notary public in and for Clinton county, Iowa, by the above-named Horace Williams and Van Deventer, each for himself.

Notarial Seal. Albert R. McCoy, Iowa.

In witness whereof I have set my hand and notarial seal hereunto this 16th day of November, 1887.

A. R. McCOY,
Notary Public.

The within bond is approved November 18th, A. D. 1887.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

229½ [Endorsed:] The Sioux City & Iowa Falls Town Lot & Land Company *vs.* Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, and John M. Tredwa, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette. Supreme court of the State of Iowa. Bond. Filed Nov. 23, 1887. G. B. Pray, clerk sup. court. 12748.

230 UNITED STATES OF AMERICA:

To Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, and John M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein The Sioux City & Iowa Falls Town Lot & Land Company is plaintiff in error and Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway, and J. M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette are defendants in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Austin Adams, chief justice of the supreme court of Iowa, this 18th day of November, 1887.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

I, Daniel McDonald, sheriff of Woodbury county, State of Iowa, do hereby certify that I received the above citation on the 25th day of November, 1887, and on the same day I personally served the said citation on O. C. Tredway and Geo. W. Wakefield, attorneys of record for the defendants in the above-named suit, by reading the said citation to each of them and delivering to each of them personally a true copy of the same at Sioux City, Woodbury county, State of Iowa.

D. McDONALD,
Sheriff of Woodbury County.

Service	75
Copies	50
Milage	10
	$1 35 Paid.

[Endorsed:] The Sioux City & Iowa Falls Town Lot & Land Company *vs.* Thos. L. Griffey, Chas. Chamberlain, O. C. Tredway and J. M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette. Citation. Filed Dec. 8, 1887. G. B. Pray, clerk sup. court. 12748.

231 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and correct transcript of the record of a cause which was tried and determined in said court between The Sioux City & Iowa Falls Town Lot & Land Co., plaintiff and appellant, and Thomas L. Griffey & others, defendants, to wit, the abstract, amended abstract, and three maps filed by plaintiff and additional abstract filed by defendants, together with the decision or opinion and final judgment rendered therein by said court.

And I further certify that the petition for the removal of said cause to the Supreme Court of the United States, writ of error, bond, and citation are hereto attached in original form and here-
232 with certified as a part of the transcript herein, true and correct copies thereof remaining on file in my office, and this return is made in obedience to said writ of error. The maps referred to in the transcript and this certificate are transmitted herewith in a separate package marked and identified as stated on page 165 of the transcript.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 6th day of April, 1888.

G. B. PRAY,
Clerk Supreme Court of Iowa.

233 In the Supreme Court of the United States.

THE SIOUX CITY AND IOWA FALLS TOWN Lot and Land Company, Plaintiff in Error,

vs.

THOMAS L. GRIFFEY, CHARLES CHAMBERlain, O. C. Tredway and John M. Tredway, and Wm. W. Curtis, Geo. Earle, and Samuel S. Burdette, Late Transacting Business as Land Attorneys in Washington, D. C., under the Firm Name of Curtis, Earle & Burdette, Defendants in Error.

} Assignment of Error.

Now comes the plaintiff in error and makes the following assignment of error and says there is manifest error in the record and proceedings, in this—

1st. That the court erred in so construing the act of Congress of May 15, 1856, making a grant of lands to the State of Iowa under which plaintiff claims title as to hold that the title to the northwest quarter (N. W. 4) of section 27, township 89, range 47 west of the 5th P. M., State of Iowa, which had inured to the plaintiff under the grant was invalid and inferior to the claim of the defendants to said land under the Griffey pre-emption.

2nd. That the court erred in so construing said acts of Congress making the land grant as to hold that the railroad company's rights through which plaintiff claims did not attach to said land
234 until the map of definite location of the line of road was filed in the office of the Secretary of the Interior.

3rd. That the court erred in so construing the pre-emption law of 1841 under which defendant Griffey acquired title as to hold his pretended settlement and improvements upon said land gave him any right thereunder.

4th. That the court erred in holding that the acts of Thomas L. Griffey under the pre-emption laws of the United States *was* a compliance with said law and gave him any rights thereunder.

5th. That the court erred in so construing the act of Congress April 21st, 1876, making valid pre-emption and homestead entries within the limits of railroad grants as to hold the act- of the Commissioner of the General Land Office and Secretary of the Interior restricting the pre-emption entry of Thos. L. Griffey and issuing a patent thereunder for the land in suit are valid and that the patent issued under said act was of any validity.

6th. That the court erred in so construing the act of Congress making the grant of land to the railroad company as to hold that the title acquired under said grant did not pass to the grantee of the railroad company so that his grantees would be protected thereunder as against the claims of the grantees of Thos. L. Griffey. Therefore the plaintiff in error prays that the said judgment may

be reversed and held for naught, and that it be restored to all its rights.

WM. L. JOY,
Solicitor for Plaintiff.

Endorsed on cover: Iowa sup. court. No. 157. The Sioux City & Iowa Falls Town Lot & Land Company, plaintiff in error, *vs.* Thomas L. Griffey, Charles Chamberlain, O. C. Tredway, John M. Tredway, William W. Curtis, George Earle, and Samuel S. Burdett. Filed October 6, 1888.

Office Supreme Court U. S.
FILED.
DEC 26 1891
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

NO. 157.

OCTOBER TERM, 1891.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND COMPANY, Plaintiff in Error.

vs.

THOMAS L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. TREDWAY, JOHN M. TREDWAY, WM. W. CURTIS, GEORGE EARL AND SAMUEL S. BURDETTE, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

WM. C. GOUDY AND WM. L. JOY,
Solicitors for Plaintiff in Error.

JOY, HUDSON, CALL & JOY, of Counsel for Plaintiffs in Error.

O. C. TREDWAY, GEO. EARL AND JOHN F. DUNCOMBE,
Solicitors for Defendants in Error.

CURTISS, CARLISLE & BURDETTE, of Counsel for Defendants in Error.

STATEMENT OF CASE FOR PLAINTIFF IN ERROR.

On the 29th day of June, 1883, the Sioux City & Iowa Falls Town Lot & Land Company, plaintiff in error, filed its petition in equity in the District Court of Woodbury County, Iowa, claiming title to the Northwest Quarter of Section Twenty-seven (27), Township Eighty-nine (89), north of Range Forty-seven (47), in Woodbury County, Iowa, under the act of

congress, approved May 15th, 1856, granting land to the state of Iowa to aid in the construction of four lines of railroad across the state, one from the city of Dubuque, Iowa, to a point on the Missouri river near Sioux City.

This act grants to the state of Iowa, to aid in the construction of said railroad, every alternate section of land, designated by odd numbers for six sections in width on each side of said road, but reserves and excepts from the grant any section or part of section which the United States may have sold or otherwise disposed of, or to which the right of pre-emption had attached at the time the line of road became definitely fixed; and in case it should appear when the line of said road shall be definitely fixed that the United States had disposed of the lands so granted, or any part thereof, it should be lawful for any agent appointed by the governor of the state of Iowa to select, subject to the approval of the Secretary of the Interior, other lands in alternate sections, designated by odd numbers, within fifteen (15) miles of the line of railroad, an amount equal to those so disposed of by the United States.

The state of Iowa, by an act of its legislature, approved July 14th, 1856, accepted this grant and in the same act granted the said lands to the Dubuque & Pacific Railroad Company, a corporation which had located a large portion of its line of road from Dubuque to Sioux City prior to the said 14th day of July, 1856.

The act of the said legislature required that the line of railroad be definitely fixed and located on or before the 1st day of April next after the passage of the act, and that maps or plats showing said line or route be filed in the office of the governor of the state of Iowa, and also in the office of the secretary of the state of Iowa. It made it the duty of the governor, after affixing his official signature, to file such map in the department having control of the public lands in Washington. It further provided that such location is to be considered final only so far as to fix the limits and boundary in which said lands may be selected.

The Dubuque & Pacific Railroad Company completed the survey and location of that portion of said line of railroad that had not been formerly located between May 30th and August 31st, 1856.

The survey and definite location of the line of road was made under and by virtue of the order and resolution of the board of directors of the railroad company, adopted on the 26th day of May, 1856, directing B. B. Provost, chief engineer of said road, to locate and definitely fix said route.

The map showing the definite location of the line under said resolution and the time of location was certified by the officers of said company on the 27th day of September, 1856, and was filed in the offices of the governor and secretary of the state of Iowa, and certified by the governor on the 2d day of October, 1856. This map, duly certified, was filed in the general land office at Washington October 13th, 1856.

The line of said road was surveyed and staked off upon the ground past the land in controversy on the 5th day of July, 1856, the line running but a few rods west of said land in suit.

That at the time of the passage of the said act of the legislature, the line of road had been located, commencing at Sioux City, as far east as Section 16, Township 92, range 43, a distance of about 45 miles.

Upon the location of said line of road it was found that a large amount of land in sections designated by odd numbers within the six-mile limit of said road had been sold and otherwise disposed of by the United States.

The governor of the state of Iowa appointed Bernhart Henn as agent, as provided in said act of congress, approved May 15th, 1856, to select other lands between the six and fifteen mile limits, in lieu of the lands disposed of within the six-mile limits, and on the 14th day of September, 1856, said Henn selected all the vacant and unappropriated lands between the six and fifteen mile limits of said railroad.

The Secretary of the Interior on the 27th day of Decembes, 1856, approved the said selections and certified to the state of Iowa all the lands within the six and fifteen mile limits to which there was no adverse claim, on what was known in the department as the "clear lists."

That some of the odd-numbered selections within the six and fifteen mile limits were then encumbered by pre-emption filing, made after the right of the railroad company attached to the lands.

These lands embraced the land in suit, and on the 7th day of April, 1863, the land in suit was certified to the state of Iowa for the railroad company under the congressional grant of May 15th, 1856.

In 1860 the Dubuque & Pacific Railroad Company conveyed to the Dubuque & Sioux City Railroad Company, a corporation organized under the laws of Iowa, the railroad then constructed, and its franchises and the said land grant, so far as the same was then undisposed of.

Prior to April, 1868, the Iowa Falls & Sioux City Railroad Company, by contract with the Dubuque & Sioux City Railroad Company, acquired the rights the Dubuque & Sioux City Railroad Company had to that portion of the land that had not then been earned by reason of the road constructed. The state of Iowa, by act of legislature, approved April 7th, 1868, ratified and confirmed the contract made between the Dubuque & Sioux City and the Iowa Falls & Sioux City Railroad Companies, and by said act granted the Iowa Falls & Sioux City Railroad Company, upon the terms and conditions and restrictions in said act contained, all the lands granted by said act of congress that had not been earned and appropriated by reason of the road already constructed. The unappropriated lands embraced and included the land in suit.

After the ratification of said contract the Dubuque & Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company adjusted their rights under the said grant, and under said adjustment the land in suit belonged to and was held by the Iowa Falls & Sioux City Railroad Company under the said act of congress and of the legislature of the state of Iowa.

That by said act of the legislature the time for the completion of the said road to Sioux City was extended until the 1st day of January, 1872.

The Iowa Falls & Sioux City Railroad Company, by its president, filed with the governor of Iowa its written acceptance of the grant under the said act, as by said act required.

The said railroad was completed to Sioux City during the month of March, 1871, and upon the completion of said road the Iowa Falls & Sioux City Railroad Company became entitled to a patent for all the land inuring to said company under

said grant, and, having made the requisite proof thereof, the governor of the state of Iowa, on the 5th day of July, 1871, patented the land in suit to said company, which patent was filed for record and recorded in the recorder's office of Woodbury County, Iowa, on the 5th day of August, 1871; and on the 9th day of June, 1871, the Iowa Falls & Sioux City Railroad Company conveyed by warranty deed the said land to C. C. Vail, who on the 10th day of June, 1871, conveyed the same to John I. Blair by warranty deed, which deeds were filed for record and recorded in the recorder's office of Woodbury County, Iowa, on the 5th day of August, 1871.

That as soon as the land was certified to the state in 1863, as inuring to the railroad company under the said grant, the said company took possession thereof, and the said Iowa Falls & Sioux City Railroad Company and its grantees have been in actual, open, notorious and adverse possession thereof ever since, and have fenced, cultivated and improved the said land, paid all the taxes assessed and levied upon the said land since the same was patented to the railroad company July 5th, 1871.

That on the 10th day of May, 1856, the commissioner of the general land office by a dispatch of that date, which was received by the Sioux City land office on the 26th day of May, 1856, withdrew from sale or location all the government land in that district. On the 15th day of May, ~~one~~ the same day ~~after~~ the passage of the act of congress, making the grant to the state of Iowa for the four land-grant roads across the state, the commissioner. by letter of that date to the register and receiver of the local land office at Sioux City, repeated the order withdrawing all lands in the Sioux City district, south of the line dividing townships 91 and 92, from sale or location, for the purpose of adjusting the several grants. This letter was received at the land office in Sioux City on the 8th day of June, 1856.

On the 19th day of July, 1856, Thomas L. Griffey, one of the defendants in error, made pre-emption filing upon the land in suit, alleging settlement on the same day, and was allowed by the local office to enter said land as a pre-emption on the 5th day of September, 1856.

On the 7th day of July, 1857, the pre-smption entry of the said Griffey was cancelled by the commissioner of the general

land office for conflict with the land grant to the Dubuque & Pacific Railroad.

That on the 30th day of June, 1882, the said land was erroneously patented to the said Griffey under the act of congress of April 21st, 1876.

That the commissioner of the general land office and the secretary of the interior under said act had no power or authority to divest the plaintiff of its vested rights, and take from it land that it had purchased in good faith, paid taxes upon, cultivated and improved for more than ten years after the same had been patented to the railroad company, and more than nineteen years after the land had been certified to the state as inuring to the railroad company under the grant.

That the pre-emption filing of Thomas L. Griffey was made for speculative purposes; that he never resided upon and cultivated the land, as required under the pre-emption law; and that he acquired no rights thereto, by reason of his sham residence and pretended settlement thereon.

That the co-defendants of said Griffey all claim through and under him, and that their claims to said land are barred by the statute of limitations, and that defendants are estopped by their laches from asserting any claim to the said lands as against the plaintiff.

In June, 1883, the defendants by force and violence attempted to take possession of the said land. The plaintiff obtained a writ of injunction enjoining the defendants from interfering with plaintiff's use and occupancy of said premises, and brought this suit to quiet title in plaintiff.

Upon the hearing in district court plaintiff's bill was dismissed and defendants decreed to be the owners of said land under the Griffey patent, from which decree plaintiff appealed to the Supreme Court of Iowa.

That upon the 10th day of October, 1887, the said court, construing the act of congress of May 15th, 1856, held that the railroad company's rights did not attach to the land granted until the filing of the map of definite location in the office of the secretary of the interior on the 13th day of October, 1856, and so construed the pre-emption act of 1841 as to give Thomas L. Griffey a right thereunder to the land in suit superior to the plaintiff's title derived from the railroad company taking under

the grant, and so construed the act of congress of April 21st, 1876, as to hold that the vested rights of the plaintiff in the lands in suit could be divested by the commissioner of the general land office and the secretary of the interior, and, so holding, affirmed the decision of the district court of Woodbury county, and on the 18th day of November, 1887, the plaintiff in error procured the allowance of a writ of error to the Supreme Court of Iowa and brought the case on error to this court, and makes the following assignment of error:

1st. That the court erred in so construing the act of congress of May 15th, 1856, making the grant of lands to the state of Iowa under which plaintiff claims title as to hold that the title to the Northwest Quarter of Section 27, Township 89, Range 47, west of the Fifth P. M., state of Iowa, which had inured to the plaintiff under the grant, was invalid and inferior to the claim of the defendants to the said land under the Griffey pre-emption.

2d. That the court erred in so construing said act of congress making the land grant as to hold that the railroad company's rights throughwhich plaintiff claims did not attach to said land until the map of definite location of the line of road was filed in the office of the secretary of the interior.

3d. That the court erred in so construing the pre-emption law of 1841, under which the defendant Griffey acquired title, as to hold his pretended settlement and improvement upon said land gave him any right thereunder.

4th. That the court erred in holding that the acts of Thomas L. Griffey under the pre-emption laws of the United States were in compliance with said laws and gave him any rights thereunder.

5th. That the court erred in so construing the act of congress of April 21st, 1876, making valid the pre-emption and homestead entries within the limits of railroad grants, as to hold the act of the commissioner of the general land office and secretary of the interior restoring the pre-emption entry of Thomas L. Griffey and issuing the patent thereunder for the land in suit are valid and that the patent issued under said act was of any validity.

6th. That the court erred in so construing the act of congress, making the grant of land to the railroad company, as to

hold that the title acquired under said grant did not pass to the grantee of the railroad company so that its grantees would be protected thereunder as against the claim of the grantees of Thomas L. Griffey.

Brief and Argument of Plaintiff in Error.

The first and second assignments of error call for the construction of the congressional act of May 15th, 1856, and the determination of the rights of the Dubuque & Pacific Railroad Company under the grant made by said act, and when those rights attached to the land granted. These questions can be best presented together.

The plaintiff in error's title to the land in suit is based upon the congressional grant of May 15th, 1856, and the act of the state legislature of Iowa, approved July 14th, 1856, accepting the grant and conferring the same upon the Dubuque & Pacific Railroad Company, through and under which plaintiff derives its title.

The defendants in error claim the land under the pre-emption filing of Thomas L. Griffey, made July 19th, 1856, alleging settlement on that day, and the entry allowed under said filing by the local land office on the 5th day of September, 1856, which entry was cancelled by the commissioner of the general land office on the 7th day of July, 1857, and the reinstatement of the Griffey pre-emption claim under the said act of congress approved April 21st, 1876, and the patent for the said land issued to him on the 30th day of June, 1882.

The congressional grant of 1856 and the act of the state legislature conferring upon the railroad company the rights granted by said act of congress have been so often construed by the courts, both state and federal, that there is no longer a doubt as to the nature of the grant and the title which passed to the state and from the state to the railroad company.

The Supreme Court of Iowa, in the case of Fremont and Mills Co., vs. B. & M. R. R. Co., 22 Ia. 91. 124, says:

"That, while these are additional grants in presenti, yet they are in the nature of floats which do not attach to any particular parcel of public lands until the necessary determinative lines of railroad shall have been definitely fixed."

See also C. R. I. & P. R. R. Co. vs. Grinnell, et al, 51 Ia., 477.

This court has repeatedly held the same doctrine, construing a similar grant.

In the case of Schulenburg et al vs. Harriman, 21 Wall., 44, the court says:

That the act of congress of June 3d, 1856, passed a present interest in the lands designated, there can be no doubt."

The language used imports a present grant.

"It is true the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections to be afterwards located when the route was fixed. Then the location became certain and the title, which was previously imperfect, acquired precision and became attached to the land."

See, also, B. & M. R. R. Co. vs. Fremont County, 9 Wallace, p. 94.

The H. & St. J. R. R. Co. vs. Smith, 9 Wallace, 96.

Van Wyck vs. Knevals, 106 U. S. 360.

K. P. R. Co. vs. Dunmeyer, 113 U. S. 629.

Under these decisions the time of the definite location of the line of railroad, aided by the grant, becomes the material question. Upon its location the company's rights attach to the land in place. From that time these lands within the six mile limits are no longer subject to sale or entry under pre-emption acts; they are appropriated lands.

Under many of the land grants the act conferring the grant provides what must be done before the grant becomes operative. The filing the map with the secretary of the interior, under many of the grants, showing the location of the line of railroad, is required before the grantee's rights attach to the land granted, and generally, whatever the requirements of the act making the grant are, the company taking the grant must comply with the conditions imposed.

The act of congress of May 15, 1856, does not require the filing of a map showing the definite location of the line of road; neither does it prescribe the act necessary to be done to make a definite location of the line. This, by the act, was left to the companies taking under the grant to do in their own way. The

act of the state legislature of July 14, 1856, required the company taking under that act to locate their respective lines of road on before the 1st day of April next after the passage of the act, and file maps or plats, showing such lines or routes, in the office of the governor of the state of Iowa and also in the office of the secretary of the state, and the governor was required to affix his official signature to the map and file the same in the department having the control of the public lands in Washington.

T. R. p. 28.

The Dubuque and Pacific railroad, taking this grant under said act, located its entire line of road prior to August 31, 1856. The map was certified by the officers of the company September 26, 1856, and filed in the office of the governor of the state of Iowa on the 2d day of October, 1856. The governor signed and certified the map on the same day and filed it in the general land office October 13, 1856, with the proper certificates and endorsements thereon.

The railroad company thus complied in every respect with the conditions and requirements of the acts of congress and of the state legislature.

The act of congress being silent as to what should constitute the definite location of the line of road under the act, Attorney General Cushing, soon after the passage of the act, decided that, as against those seeking to enter by pre-emption tracts of land within the granted limits, the surveying and marking the line of railroad upon the surface of the earth over which the road will be built, fixes the time when the rights of the company attach to the specific tracts of land. (T. R. p. 77 and 80).

Opinion Attorney General, 8 vol., pp. 390 and 244, 9 Opinions, p. 41.

The secretary of the interior, under date of March 3, 1857, adopted the opinion of the attorney general, and from that date the rules and decisions of the land department have been in accordance therewith. (T. R. p. 77).

For more than twenty-five years the grant has been adjusted upon this basis. The rights of the company to the lands in the granted limits have been held to attach—in the language of the attorney general—from day to day as the line

of road was surveyed and definitely marked upon the ground. When the act of congress does not provide what shall be done to definitely fix the line of road, it was competent for the secretary of the interior to determine what the company must do before the department would recognize its rights; and, if the regulations of the department violate no law, the courts will not interfere or establish a different rule.

In Vance vs. The B. & M. R. Co., 12 Neb. p. 285, 287, the court says: "Whenever the question of right to land under the act of congress through which the defendant company here claims title, or others of similiar import, has been considered by the supreme court of the United States, the holding, in effect, has been that the grant is of a present interest and effective, as against all adverse claimants, immediately, upon and from a precise designation thereof, which designation is accomplished either by a definite location of the line of railroad upon the ground or through a specific selection by numbers. And, further, that where lateral limits are given, within which the grant is to operate—as in that made to the Union Pacific railroad company, and in most of the others giving like aid—no specific selection by numbers is requisite, the definite location of the track being sufficient."

The supreme court of the United States, R. R. Co. vs. Fremont County, 9 Wallace, p. 89, 94, construing the grant under which plaintiff claims, says: "Until the line of the railroad was definitely fixed upon the ground there could be no certainty as to the particular sections of land falling within the grant, nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed."

In C., R. I. & P. R. R. Co. vs. Grinnell, et al., 51 Iowa, p. 477, 482, the court says: "The survey of route and the location of the line of the railroad is a part of the work of construction. These are the beginning of the work, it is true, but, are nevertheless, a part of the work and a very important part. * * * When done the route or line of the road is fixed—definitely fixed."

As we have seen, the congressional act of May 15th, 1856, (set out in T. R. pages 26, 27 and 28), does not require the making or filing of the map of definite location of the line of road

and imposes no duty upon the commissioner of the general land office or the secretary of the interior with reference to the withdrawal of the lands from sale or pre-emption upon the filing of the map of the located line.

The silence of the act in this respect is significant, and the reason is found in the fact that on the 10th day of May, 1857, the commissioner of the general land office, by a dispatch directed to the registers and receivers of the several land offices in the state of Iowa, had ordered all of the public lands in the state suspended from sale or location until further ordered, and on the same day had directed by dispatch the register and receiver at Sioux City to suspend from sale or location all the lands in their district, situated south of the line which divides townships 91 and 92 until further orders.

These dispatches reached Sioux City May the 26th. The local offices were required to acknowledge by telegraph and mail the receipt of the dispatches (see T. R. pages 39 and 40), and on the 15th day of May, 1856, the day upon which the act of congress making the grant was passed, Thomas A. Hendricks, commissioner, addressed the following letter to the register and receiver at Sioux City:

"GENERAL LAND OFFICE, May 15th, 1856.

"Register and Receiver, Sioux City, Ia.—Gentlemen: By my telegraphic dispatch of the 10th inst., you were directed to suspend from sale or location all the lands in your district situated south of the line dividing townships 91 and 92 until further orders. The object of this withdrawal was to protect from sale the lands granted to the state of Iowa for four railroads running from the Mississippi to the Missouri river by a bill which has just passed both houses of congress. Said bill, having this day been approved by the president, has become a law, and you will continue to withhold the lands from sale or location until otherwise directed. It is designed to adjust the several grants with as little delay as is practicable, in order that the lands remaining to the United States may be restored to market.

"THOMAS A. HENDERICKS, Commissioner."

Received at Sioux City June 8th, 1856.

Which letter, duly certified is found in T. R., page 40.

The previous dispatches and the letter embody the views of the department, and are a declaration of the policy to be pur-

sued with reference to the grant made at that time; and, as the public lands in the state of Iowa before the passage of the act of congress, had been suspended from sale and location, there was no necessity for any provision in the act as to the withdrawal of the lands from sale or location. The land had already been withdrawn upon filing the map showing the definite location of the line of road in anticipation of the passage of the act of congress, as was the custom at that time.

In Leavenworth, Lawrence & Galveston R. R. vs. United States, 92 U. S., p. 733, 748.

Speaking with reference to the customs that prevailed in the land department with regard to the withdrawal of lands within prospective railroad limits, the court says:

"Formerly lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market But experience proved that this practice retarded the settlement of the country, and at the date of this act (1863), the rule was not to withdraw them until the road should be actually located. In this way the ordinary working of the land system was not disturbed; private entries, pre-emption and homestead settlements, and reservations for special uses continued within the supposed limits of the grant the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed."

The public lands in the state of Iowa, as we have seen, had been withdrawn prior to the grant, in accordance with the custom that then obtained in reference to such matters, and the letter of the commissioner dated May 15th, 1856, was an announcement of the policy to be pursued by the government with reference to this land grant, and an assurance upon which the state of Iowa and the railroad company upon which it conferred the grant might rely.

The lands, as therein stated, were withdrawn for the purpose of the adjustment of the respective grants. The assurance is given that the lands not falling within the grants would be restored to sale and location as soon as the grants could be adjusted.

That this course was lawful; that the department had the undoubted right so to do; that it was then regarded as the proper policy to pursue, there can be no question. It was then

the settled and established custom, and the companies taking under the grant from the state had the right to rely upon the settled policy of the government with reference to these land grants being carried out.

The act of the state legislature accepting the grant, approved on the 14th day of July, 1856, clearly shows the construction placed upon the act of May 15th at that time. The tenth section thereof is as follows:

Sec. 10. All persons who at the time said grant was made had valid claims by actual occupation and improvement upon any of the land embraced in said grant shall be protected in the same and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

Section 11 of the act points out specifically the terms upon which the land so settled upon could be entered. (See T. R. p. 30).

By this provision of the act those who had actual settlement upon the lands at the date of the grant were to be protected; and, as the lands had been withdrawn from sale or location prior to the passage of the act of congress, no rights could accrue after the passage of the act which could take from the grant lands embraced therein.

The act conferred upon the railroad company the lands which passed under the congressional grant of May 15th, 1856, and the company took the grant subject to the stipulations and provisions embraced in sections 10 and 11. Clearly it was not contemplated then that the rights of the company depended upon the filing of the map of definite location of its line of road in the office of the secretary of the interior.

This the company was not required to do by the grant. The land department did not base its action in carrying out the grant to the company upon the right acquired by filing the map. This is made more apparent by the fact that the governor of the state of Iowa appointed Bernhart Henn agent soon after the passage of the act of May, 1856, to select the lands within the fifteen-mile limits in lieu of those sold and disposed of within the six-mile limits. These selections were completed during the month of September, 1856, before the map of definite location of the line of road was filed in the office of the secretary of the interior, but after the actual

survey and location of the same was made upon the ground. Upon this survey and staking of the line upon the ground this action was based. These selections were approved by the secretary of the interior and certified to the state of Iowa as inuring to the company under the grant.

Now, if the rights of the company only attached upon filing the map of definite location in the office of the secretary of the interior, clearly no selections could have been made within the fifteen-mile limits until such map was filed. All the acts on the part of the state agent in making such selections prior to the 13th day of October, 1856, the date of the filing of the map, were unauthorized and void.

At the time the grant was made to the state of Iowa and the contract made between the state and the railroad company taking under the grant Griffey had and claimed no interest in the land in suit. All the public lands within the Sioux City district had been withdrawn from sale or location, so no adverse rights could attach. The state and railroad company had a right to rely upon the land department protecting the grant so that it would not be cut down or impaired. The contract with the state of Iowa and the railroad company was made under the circumstances and conditions that existed at that time. The letter of Commissioner Hendricks was a public declaration of what the land department would do in carrying out the grant. The company taking under the grant had a right to and did rely upon the statements therein contained,

The question now is, what were the rights of the parties under the grant, in view of all the facts and circumstances, decisions and rulings of the deparment that then obtained?

If the act of congress making the grant did not prescribe and provide the manner in which the department should carry it out on the part of the government, it was left to the land department to make such needful rules and regulations as were necessary to carry into effect the will of congress; and when this was done by the department in good faith, and the grant has been adjusted, based upon those rules and regulations, the courts will not interfere to disturb vested rights after the lapse of so many years.

This grant, like every other, must be construed in the light of the surrounding circumstances, and, when so construed, it is

apparent beyond all question that the company's rights were not regarded or held to depend upon the filing of the map of definite location, as the act of congress made no provision for the filing of any such map, and nothing was to be done by the land department or the secretary of the interior, with reference to the grant upon the filing of such map, no rights were to be secured and none forfeited by the filing or failure to file the map, for the simple reason that no such thing was required by the terms of the grant.

How can the company's rights be made dependent upon something not required by the act making the grant?

Now the silence of the grant, as to what should constitute the definite fixing or locating of the line of road, left it to the company taking the grant to determine how this should be done, and when it had so located its line of road upon the ground and filed the evidence of what had been done in the form of a map of definite location, within the time fixed by the state statute, it had complied in every respect with the requirements of the grant under both the federal and state statutes.

The company made the survey and staked off the line upon the ground, left visible monuments and stakes marking the located line across the state. These visible monuments and stakes were notice to the world that the lands along the located line were within the granted limits. Nothing would more clearly impart notice and bring home to the mind of the seeker for a home upon the government lands the fact of the railroad claim than this.

This surveying and staking out of the line upon the ground is the actual, visible act done in the locating of the line of road; the map prepared is but the evidence of what had been done in the field.

The opinion of Attorney General Cushing, already referred to, given soon after the grant of 1856 was made, strongly urges this view of the matter and clearly holds that as between a preemptor and the railroad company the right of the company attached to the land within the limits from day to day as the work progressed.

This view was adopted by the secretary of the interior and became the rule that obtained in the adjustment of the early land grants. It was competent for the secretary of the inter-

ior to require of the company the actual surveying and staking of the line upon the ground, it was competent for the department to make this the evidence that the right of the company had attached to the particular tract or tracts of land within the granted limits, the regulation was deemed a necessary and proper one for the purpose of carrying into effect the provisions of the grant, and when the rules of the department and the decisions carry out the will of congress in reference to the disposition of the public domain, a claimant to the land cannot be heard to question the wisdom of the rule.

It is not a question as to whether the regulation is the wisest that could have been made, or the test the best that could have been devised as to the time that the company's rights attached to the land, but rather, was it a lawful regulation? Had the department the right to make this the test?

And, if so, a person having no interest in the land in question at the time the policy with reference to the grant was fixed and determined is in no position to complain.

If in direct terms congress had required of the company taking under the grant to have surveyed and staked out the line of road, and had made this surveying and staking the test as to when the company's rights attached to any specific tract of land, there can be no question with reference to the lawfulness of the requirement and no question but what the company taking under the grant would have been compelled to have shown the surveyed and staked line before its rights would have attached.

Now if the act making the grant is silent and it is left to the department to make such regulations as are necessary for carrying into effect the grant of congress, and if the attorney general and secretary of the interior determined that this very thing—the surveying and staking of the line—determined the rights of the company and attached its rights to the particular tracts of land within the granted limits, certainly the one requirement is just as valid as the other, and if complied with by the company taking under the grant will protect the company's rights.

The regulation interfered with no act of congress, impeded in no way the carrying out of its will, deprived no one of any rights that had attached prior to the making of the grant; and when such vast interests have been settled and adjusted, based

upon it, and so many years elapsed since the settlement and adjustment of the grant, a court of equity will be slow to lend its aid in furtherence of Griffey's speculative scheme.

While there is no question but that the actual survey and staking out of the line of road upon the ground was held to be the act which attached the grant to the specific tracts of land, as between the company and the pre-emptor, under the act of May 15, 1856, it is claimed that the rule has been changed, and cases are cited in which the apparent holding of the court is that the filing of the map of definite location attaches the grant to the specific tracts.

Yet a careful examination of the acts under which these decisions have been made discloses that they either contain an express provision requiring the filing of the map of definite location of the line of road, or that it is made the duty of the secretary of the interior to withdraw the lands from market upon the filing of such map.

In the case of

Van Wyck vs. Knevals, 106 U. S., 360,

this court construes the act of congress of April 23d, 1866, granting to the state of Kansas certain lands to aid in the construction of a railroad in said state; and, while many of its provisions are similar to the provisions of the act of congress of May 15th, 1856, making the grant to the state of Iowa, yet in the Fourth Section of that act is the provision that "As soon as the said company shall file with the secretary of the interior maps of its line designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the land granted by this act, in such a manner as may be best calculated to subserve the public interest."

The question presented and decided in this case was, when did the right of the company attach to the land granted? On one side it was contended that it attached when the map of the line of definite location of the road was filed with the secretary of the interior; on the other, that it attached, as against the pre-emptor, only when notice of the withdrawal of the lands from sale or settlement was given. Under this act the filing of the map of definite location was provided for, and then, and not till then, was the secretary of the interior required to withdraw the lands from sale.

In the case at bar the lands were withdrawn before the grant was made, and the action of the secretary was in no manner made dependent upon the filing of a map of definite location; and, under the provision of the grant, the decision throws but little light upon the question here presented.

The case of

Railroad Co. vs. Herring, 110 U. S., 27,

is often referred to as a case supporting the changed rulings of the department. Although the Air Line R. R. Co. was one of the companies receiving under the grant of 1856 the lands conveyed to the state of Iowa for the purpose of aiding in the construction of the four land-grant roads across the state, the lands were resumed and regranted by the state of Iowa to the Cedar Rapids & Missouri River R. R. Co., and the act of congress of June 2d, 1864, authorized said company to modify or change the location of the uncompleted portion of its line and to connect this line of road by a branch with the line of the Mississippi & Missouri R. R. Co.; and the said Cedar Rapids & Missouri River R. R. Co. were entitled by such modified line to the same lands and the same amount of lands per mile, and for such connecting branch the same amount of lands per mile, as originally granted to aid in the construction of its main line and it was further provided that "Whenever said modified main line shall have been established, or such connecting line located, the Cedar Rapids & Missouri River R. R. Co. shall file in the general land office of the United States a map definitely showing such modified line and such connecting branch aforesaid, and the secretary of the interior shall reserve or cause to be certified and conveyed to the said company from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption right or the right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made, under color of title derived from the United States or from the state of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act of which this is an amendment."

No duty devolved upon the secretary of the interior to reserve any of the land from sale until the new line was established. Until this was done the sections not included within the six-mile limit were open to sale and pre-emption. The time when it became the duty of the land office to suspend these lands from sale was under the control of the company, for whenever they established, and filed in the general land office a map definitely showing this modified line of their route, the duty of the secretary arose, and not till then.

"This was not done until December 1st, 1867, three years and a half after the passage of the act requiring it to be done, under which plaintiff's rights accrued. It is true a map of a part of the line was filed in 1865, but this can in no sense be said to be a map definitely showing the line of the road; it showed only a part of it, and it showed a portion of the route where the road would yet be carried, and what land the company would be entitled to when finished. In all these cases the requirement has been a map of the line of a road; the whole road, not a part of it; a complete map, and not a partial one; a map showing the line of road, as the act clearly reads; and it was during the delay of three years and a half that the entries were made under which the defendants held the land and acquired the legal title."

The controversy in this case was over the homestead claims made to the even sections which passed under the act of 1864. None of them were lands in place, and by the terms of the act making the grant the company's rights did not attach until the filing of the map of the modified line and the selections of the lands to make up for the deficiency in the granted limits; and the decision in that case throws no light upon the questions involved in the suit at bar.

There, by the terms of the act, it was made obligatory upon the company to file with the secretary of the interior a map of the modified line. Upon the filing of this map it was made his duty to withdraw the lands from market, and under this plain provision of the statute making the grant if the railroad company neglected and failed to comply with its provisions it may be justly visited with the consequences of its neglect.

In the case of
Walden vs. Knevals, 114 U. S., 373.
this court, construing the act of congress of July 23d, 1866, 14 Stat. 210, held that the rights of the company attached to the lands in place upon filing the map of definite location in the office of the secretary of the interior. By the terms of the grant this the company was required to do, and when the company had complied with this requirement of the grant, it was made the duty of the secretary of the interior to withdraw the lands from sale.

The question decided was whether the failure of the secretary to withdraw the lands from sale after the company had complied with the requirements of the grant defeated the rights of the company to the land within the place limits; and, following the doctrine laid down in the case 106 U. S., 366, already referred to, this court holds the company could not be deprived of its rights by failure of the secretary to perform his duty in the withdrawal of the lands.

In Railway Company vs. Dunmeyer, 113 U. S., 629,
this court construing the act of July 1st, 1862, 12 Stat. 489, and the amendatory act of July 2d, 1864, 13 Stat. 356, and the act of July 3d, 1866, 14 Stat. 79, under which the railroad company claim in that case, finds that in the seventh paragraph of the act it is provided that within two years after the passage of this act said company shall designate the general route of said railroad, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale, and whenever any portion of the said route shall be finally located the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes therein named.

It appears that at the time of the passage of the amendatory act of 1864 the general route of the road had not been designated, and therefore the 5th section of the act says that the time for the designating the general route of said railroad and filing the map of the same and the time for building that part of the railroad required by the terms of the said act (1862) be

and the same is hereby extended one year from the time in said act designated.

It appears that in the year 1866 the time for the designation of the general route had expired one year before, and it had not yet been done or completed. To relieve the company from this failure to comply with the law, congress enacted July 3d, 1866, "that the Union Pacific Railroad Company, east division, (which was a branch, now called the Kansas Pacific Railroad Company), is hereby authorized to designate the general route of their said road and file a map thereof, as now required by law, at any time before the 1st day of December, 1866; and upon the filing of said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the secretury of the interior."

Under this latter statute the railroad company filed its map of the general designation of the route in the department of the interior July 11th, 1866, fifteen days before Miller's entry.

It will be observed that by the act of 1862, upon the filing of the company's map of designation of its general route the secretary was required to withdraw the lands within fifteen miles of said designated route from pre-emption, private entry and sale. In the act of 1866, after the company had neglected for four years to make this designation of their general route, they were allowed six months longer, and no more, to file their map.

The statute did not give the secretary the same directions as to when this should be done, which the original act of 1862 gave him; but this act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from sale by order of the secretary of the interior. The lands were therefore to be reserved from sale only, and not from pre-emption or homestead entry.

And the court further says, "We are therefore of opinion, in view of the legislation of this subject, that the homestead claim of Miller had attached to the land in controversy when the line of the company's road was definitely fixed."

In this, as in the other cases to which attention has been called, there was a plain requirement of the statute making the grant that the company should file the map of definite location

with the secretary of the interior, and in many of the cases cited the secretary of the interior was charged with the duty of withdrawing the lands from sale and location, within the granted limits, upon the filing of this map, and the decisions, holding the railroad companies to a strict compliance with the requirements of the grant under which they take, has no application in cases where there is no such statutory requirement; and where no rights are gained, and none lost, by reason of filing, or neglecting to file the map of definite location, and where there is no statutory requirement in regard to the filing the map, it is left, as we have seen, to the land department to make such rules and regulations as are necessary for the orderly and prompt discharge of the business of the office, and the settlement of the rights under the grant.

The rights of the company, under the grant, to the lands in place, as against all adverse claimants, attached upon the definite location of the line upon the ground, and was in no manner dependent upon the filing of the evidence of what had been done, in the office of the secretary of the interior. (T. R. p. 29).

It is true that, in the adjustment of the grant, the evidence of what had been done by the company would be necessary. This, the act of the state legislature, conferring the grant upon the company, provided the governor of the state should furnish. This, the record discloses, was promptly done by filing the map of the located line of road in the office of the secretary of the interior, long prior to the time the act of the state legislature required it to be filed. The map so filed, it will be observed by Sec. 6, Act of State Legislature, was to be final only so far as fixing the limits of the land grant.

The certificates attached to the map filed in the office of the secretary of the interior show that, by a resolution of the board of directors of the Dubuque and Pacific railroad company, passed on the 26th day of May, 1856, B. B. Provost, chief engineer of said road, was directed to locate and definitely fix the route of said road, and that the location of that portion of said road not then located was made under and in pursuance of said resolution at the times shown upon said map, which was the 5th day of July, 1856. The testimony of T. J. Kinkaid and Thos. J. Stone also show that the line was surveyed and staked

off upon the ground past the lands in suit on the 5th day of July, 1856. Upon this there is no conflict in the testimony.

At the time the grant was made by the state to the railroad company, a large portion of the line of the Dubuque and Pacific railroad had been already located, about thirty-five miles of the western end of said line, commencing at Sioux City and running eastward, prior to the 14th day of July, 1856, and from Dubuque to a point on Sec. 25, Twp. 88, Range 29, leaving not more than seventy-five miles of road to be located at the time of the passage of the act of the state legislature, July 14, 1856. As the line had already been surveyed, staked, and marked out upon the ground, the company's rights at once attached to the lands designated by odd numbers within the six mile limits, as against all adverse claimants.

Under the decisions, as we have seen, nothing was wanting to give definiteness and precision to the grant; the company had done what the secretary of the interior held it must do, to attach its rights to any specific tracts of land as against a pre-emptor. The marking, surveying and staking out of the line located the grant, and the rights of the company attached at once to all the odd numbered sections within the six-mile limits.

An unbroken line of decisions, both state and federal, holds that the location of the line of road gives precision to the grant and attaches it to the particular lands embraced within its limits. It follows if the line of road is surveyed, marked and staked out at the time the grant was made, it attached at once to the land in place, embraced within its limits.

B. & M. R. R. Co. vs. Lawson, 58 Iowa, 145.

Blair Town Lot & Land Co. vs. Kitteringham, 43 Iowa, 462.

From the decisions it is evident that, upon the definite location of the line of road, the lands in place passed to the state in trust for the railroad company.

The company did what the officers of the grantor, charged with carrying out the grant, held it must do to protect its rights, surveyed, staked out and located its line of road upon the ground.

As under pre-emption entry, some act must be done upon the ground sought to be entered which would give notice of the settlement, so the department ruled that the line of the road

must be surveyed and staked off upon the ground. This was the initiatory step in the designation of the land granted. When the line was so marked upon the ground it was notice that the odd numbered sections within the six-mile limits had been appropriated, the filing of the map in the department, within the time required, furnished the evidence that the company had complied with the regulations prescribed by the department, the grant conferred the title, the location of the line designated the particular lands within its limits, the completion of the road, within the time fixed by the act vested an absolute title in the company.

As before stated, the map of the located line was filed long before the act of the legislature required it to be done, and the rights of the company under the rulings of the department attached before Griffey's pretended settlement.

Where, as in many of the land grants the withdrawal of the land from pre-emption or homestead entry is made dependent upon the filing of the map of the located line, or where the company neglect to file the same as required by the act making the grant, and rights attach by reason of the delay, the decisions of the courts visiting upon the company the consequences of its neglect to comply with the conditions of the grant are undoubtedly correct, but when courts forfeit rights for a failure to do what is not required by the grant they pass beyond the line of construction of the act passed, and make the law and visit penalties for failure to comply with its provisions.

Under such decisions the real question seems to be not whether the railroad company complied with the terms of the grant and became entitled to the land by reason thereof, but whether the provisions of the grant are such as they should have been.

But as congress controls the disposition of the public lands it has the power to provide upon what terms and conditions the title shall vest in its grantees, and when it has so provided the courts cannot nullify the grant by imposing conditions and requirements not contained therein. It was deemed necessary by the department immediately upon the passage of the act of congress making the grant to withdraw all the lands south of the line dividing townships 91 and 92 from sale or pre-emption in order to protect the rights of the company under the grant, the

obligation rested upon the department to protect from sale or pre-emption the land granted, if this could only be done by withholding all the odd-numbered sections in the district where the grants were made from sale or pre-emption until the grants could be adjusted; that was the proper thing to do, and the fact that this might prevent pre-emptions made upon lands which congress had appropriated is no reason why the grant should not be carried out and the company protected in its rights; it cannot be successfully claimed that the rulings of the department are erroneons which secured to the company under the grant what congress designed it should have; if such rulings prevented the consummation of Griffey's fraudulent pre-emption it was the triumph of right under law.

The argument based upon the difficulty of carrying into effect the grant, if the map of the located line was not filed in the department, has but little force under the undisputed facts in this case; there was no delay in making the survey of the line and filing the map thereof; this was done long before the act of the legislature required it to be done; all the conditions and requirements of the grant, the rule and regulations of the department were complied with, the road was built as required, now by what right can the land granted and earned by the construction of the road be taken from the grant and given to another?

It was the duty of the department to reserve the land for the purposes of the grant immediately upon the passage of the act, and such was the action of the department in reference thereto.

See Walcott vs. Des Moines River Co. 5 Wall., 688.

If, by subsequent erroneous rulings of the department, the defendant Griffey was allowed to file a pre-emption claim upon the land in suit, it could not defeat the grant and divest the company of title to the land in place within the granted limits.

It is well settled that the failure of an officer of the government charged with the performance of a duty in carrying out the grant cannot defeat the rights of the grantee to the lands granted.

This court say in the case of the Hannibal and St. Joseph Railroad Company vs. Smith, 9 Wallace, p. 99, speaking in reference to the swamp land grant, "Must the state lose the land,

though clearly swamp land, because that officer (referring to the secretary of the interior) has neglected to furnish the lists of these lands? The right of the state did not depend on his action but on the act of congress, and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the state to them could not be defeated by that delay." In this opinion the court hold the swamp land grant and railroad grant, under the act of 1856, are each grants *in præsenti* and passed to the state a present interest in the lands embraced therein.

In Morton vs. Nebraska, 21 Wallace, 674, the court say: "It appears by the record that on the survey of the Nebraska country the salines in question were noted on the field books, but these notes were not transmitted to the register's general plats, and it is argued that the failure to do this gave a right of entry; but not so, for the words of the statute are general and reserve from sale or location all salines whether marked on the plats or not."

See also Strong vs. Lehmer, 10 Ohio St., 99.

The pleadings admit that the land in suit was certified April 7, 1863, to the state of Iowa as inuring to the railroad company under the grant of May 15, 1856. (See par. 7 of petition, T. R. p. 2 and par. 7 of answer, T. R. p. 14.) From that date the legal title to said land was held by the state of Iowa, in trust for the company constructing the said road. In 1863 the grant was adjusted between the government and the railroad company. (See commissioner's letter, T. R. pp. 56 and 57.)

On the 5th day of July, 1871, the land in suit was patented to the Iowa Falls and Sioux City railroad company. (See patent, T. R. p. 52.)

From that date the full legal title vested in the said company, of which it could be deprived only by due process of law in a suit brought within the time prescribed by the law of the forum in which it is sought to enforce the right.

In Schulenberg vs. Harriman, 21 Wallace, 44. 63, the court say: "And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor, or his heirs, or the successor of the grantor, if the grant proceed from an artificial

person, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the year book down, and the same doctrine obtains where the grant upon conditions proceeds from the government. No individual can assail the title it has conveyed, on the ground that the grantee has failed to perform the conditions annexed. * * * If the grant be a public one, the forfeiture must be asserted by judicial proceedings, authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property, for the breach of the condition, such as an act directing the possession and the appropriation of the property, or that it be offered for sale or settlement. * * * In the present case no action has been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

See also, The United States vs. Repentigney, 5 Wall. 267.
Nichols vs. N. Y. & Erie R. R Co. 112 N. Y. 137.
Southard vs. Cent. R. R. Co. of N. J. 2 Dutcher, 13.
Dewey vs. Williams, 40 N. H. 222.
Lash vs. Adams, 10 Cush. 252.
Burke vs. Smith, 16 Wall. 401.

A failure to build the road for which the grant is made is the ground upon which a forfeiture may be enforced—so the courts have uniformly held.

In B. & M. R. R. Co. vs. Lawson, *supra*, the court say, speaking of the grant to the B & M. railroad company under the act of June 2, 1864: "It was a present grant, subject to be defeated upon failure to complete the railroad as required by law, and upon no other ground." And as held by the court in C., R. I. & P. R. R. Co. vs. Grinnell, 51 Iowa, 476, the right thus acquired could not be impaired by legislation, either state or national.

Under the rules and regulations made by the land department, the grant to the state of Iowa, to aid in the construction of the road from Dubuque to Sioux City, was adjusted and the land in question was certified to the state as inuring to the grant of 1863, and after the grant had been so adjusted and the land so certified, the contract was entered into between the Dubuque & Sioux City and the Iowa Falls & Sioux City railroad companies under which the Iowa Falls & Sioux City Railroad company received the unearned portion of the lands granted for the construction of the said road, and undertook the construction of the same under and by virtue of the provisions of the act of congress and of the state legislature approved April 7th, 1868.

T. R., p. 36-7-8.

By the provisions of this act the legislature of the state of Iowa legalized and confirmed the contract entered into between the Dubuque & Sioux City Rrailroad company and the Iowa Falls and Sioux City Railroad company for the construction of the said road. In the first section the said contract was ratified, and by that contract so much of the lands granted by congress to aid in the construction of the said road as shall appertain or be legally applicable to the construction of the uncompleted part of the said Dubuque & Sioux City Railroad as aforesaid, except the lands hereinafter granted to the Dubuque & Bellevue and Sabula Railroad, were granted to the Iowa Falls & Sioux City Railroad under the terms and conditions in said act provided.

At the time that this contract was ratified by the state of Iowa, and for many years prior thereto, the land in suit had been certified to the state of Iowa, and held in trust for the construction of this road. In the adjustment of the land grant of 1863, this, with other lands, passed to the state under the grant. The United States had recognized the right of the railroad company to the lands in suit, and certified the same in 1863 to the state of Iowa. The state of Iowa, trustee, had held the same in trust from that date, and in the act of April 7th, 1868, had contracted and stipulated to transfer the same to the Iowa Falls & Sioux City Railroad company when the said line of road was completed in accordance with the terms of the act of congress and of the state legislature.

On the 5th of July, 1871, the Iowa Falls & Sioux City Railroad company, having complied with the conditions and terms of the grant and constructed its road in every respect as by law required and made the requisite proof thereof, the state of Iowa patented the said land to the said railroad company.

By the acts of the general government, and of the state legislature, and the governor of the state of Iowa acting for and in behalf of the state, there is the clearest recognition of the plaintiff's rights to the land in suit, and no change of ruling in the land department as to what the company was required to do in the establishment of its line, made years after the rights attached, can disturb the plaintiff in error's vested rights.

The third and fourth assignments of error raise a question as to the construction of the pre-emption act of 1841 and the rights acquired by Thomas L. Griffey thereunder, and will be presented together.

The plaintiff in error claim the allowance by the land department of the pre-emption claim of Thomas L. Griffey, based upon settlement made after the company's rights had attached as against a pre-emptor, was erroneous, and was so held by the department, and gave no rights to the pre-emptor as against the railroad company taking under the grant.

If, as we have seen, the rights of the company attached to the land in place as against a pre-emptor upon the survey of the line of road and the staking out of the same upon the ground the officers of the land department had no power or authority thereafter to allow such entry, and the title so acquired is a nullity. So the courts have often held.

In the case of

Stoddard vs. Chambers, 2 How. 318,

the court say: "The patent of the defendant, having been for lands reserved from such appropriation, is void."

In Wilcox vs. Jackson, 13 Peters, 513.

the court hold: That the appropriation by the government of the public land is nothing more nor less than setting apart the land for some particular use; "that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or procla-

mation, or sale would be construed to embrace it or to operate upon it, although no reservation were made of it."

In Arnoid vs. Grimes and Chapman, 2 Ia., 1,
the court hold: "The land once sold or appropriated by the government, even though not patented, cannot be sold again."

In Polk's Lessees et al vs. Wendell et al, 9 Cranch, 101,
the court say: "After that cession the state of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of the state."

It will hardly be claimed that the ministerial offices of the government can do, without authority, what congress could not authorize done."

In the case of

Blair Town Lot & Land Co. vs. Kitteringham, 43 Ia., 465
the court say: "The defendant acquired no right as against the railroad company by entering upon the premises in dispute under the homestead act and his application for the land (embraced within the grant of 1864), was properly refused by the receiver of the land office."

In United States vs. Stone, 2 Wallace, p. 537,
it is held that the act of the secretary of the interior in ordering a survey to be made of lands erroneously reserved was a nullity, the same being in excess of his authority.

In Reichard vs. Felps, 6 Wallace, 164,
the court say (plaintiff holding title to the land under a patent), "the land having been previously granted, reserved from sale or appropriated, the patents of 1838 and 1853 are void."

See Walcott vs. The Des Moines Company, 5 Wall., 688.

Bellows vs. Todd, 34 Iowa, 29.

An examination of the statutes under which pre-emption entries are authorized will lead to the same conclusions. Pre-emption entries can only be allowed on unappropriated public lands, so the act granting the right expressly provides. (See pre-emption law approved September 4, 1841, sec. 10, 5th vol. U. S. Stat. at Large, 455.

Under the pre-emption act only unappropriated land could be entered. The instructions of the land department could not extend the pre-emption right to land not subject to entry under said act.

Griffey's pre-emption, based upon a settlement alleged to have been made July 19, 1856, was cancelled by the commissioner of the general land office July 7, 1857. The record discloses no appeal from this decision. T. R. p. 74.

The design and intent of the pre-emption law is to secure to the settler upon government land for agricultural purposes the benefits by it conferred; so the statute (Sec. 2259 Rev. Stat.) in express terms provides.

The courts have several times construed this act.

In Atherton vs. Fowler, 96 U. S. 518, it is held the requirements are:

1. To make settlement on the land in person.
2. To inhabit and improve the same.
3. To erect a dwelling house thereon.

In Bohall vs. Dilla, 114 U. S. 50,

the court say: "To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of the erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him.

"It must appear that, by the law properly administered, the title should have been awarded to the claimant.

"It is plain that the defendant Bohall did not bring himself within the provisions of the pre-emption laws.

"These laws are intended for the benefit of persons making a settlement upon the public land, followed by residence and improvements, and the erection of a dwelling house thereon. This implies a residence both continuous and personal. No such continuous residence was shown on the part of Bohall," and the court refused the relief prayed on that ground.

See Smelting Co. vs. Kemp, 104 U. S. 636.

Boggs vs. Merced Mining Co., 14 Cal. 279 and 363.

The evident design of the pre-emption law is to give preference, in the purchase of government land, to one who has in good faith settled upon a tract of land for the purpose and with the intent of making the same his home. This intent must be evidenced by acts, and the acts must be such as satisfy the court that the pre-emptor has complied fully with the require-

ments of the law. This rule is rigidly adherred to by the courts, when it is sought, after the lapse of years, to divest one of the title conferred by patent.

See Atkins vs. Faulkner, 11 Iowa, 327.

Harkness and wife vs. Underhill, 66 U. S. 316.

The reading of Griffey's testimony must satisfy the court that a home upon the land in suit, earned by an honest compliance with the law, was not what he sought. The evident design was to evade the law, and by a sham residence and improvements impose upon the department and secure a patent for the land.

The testimony does not disclose the extent of the foundation laid by Griffey, but if in harmony with the board shanty afterward erected upon the land, the court may well conclude that it was not a very extensive work. There was no inclosure and no cultivation ever made or attempted by him upon the land, and the pretended residence was a transparent sham.

The defendant, Griffey, was living in Sioux City with his family; he had the board shanty erected; he lived in the house three or five days before he proved up, and returned, immediately after he proved up, to his house in Sioux City, and never lived upon the land after that.

On page 91, T. R., Griffey testifies: "I took somebody down to see me live there. I remember distinctly from the amount of brandy and cherries it took for the occasion. I moved the house off in the fall, as it commenced to get cold, a month or more after I proved up. I moved away immediately after I proved up. I never lived on the premises after I proved up. The residence I spoke of three or four days before I proved up was the only residence I ever had on the land, and the improvements I have mentioned were all the improvements I ever made upon it." Such is not the continuous residence required by the statute, and the courts hold this to be one of the essentials, without which a valid pre-emption cannot be made.

The defendant, conscious of the insufficiency of what he did in the way of improvements and residence upon the land to show a compliance with the requirements of the pre-emption law, attempts to supply the deficiency by testifying to his good intentions and the sickness of a child, but in determining how

much weight these excuses for failure to comply with the law are entitled to, it should be borne in mind that the land in suit was not remote from settlements, it joined the townsite of Sioux City, and had the defendant made reasonably good improvements upon the land before he sought to prove up, and such as he would have made had he designed to make his home there, he could have taken care of the child as well there as in Sioux City. The proof discloses the house was not suitable for a family to live in, and was evidently never designed for a residence, but that was the fault of the pre-emptor in attempting to obtain title to the land without making the requisite and necessary improvements. The testimony shows that the land in suit never was the home of the defendant.

And had the land been subject to pre-emption entry on the 19th day of July, 1856, the record, we submit, discloses that Thomas L. Griffey was not a pre-emptor in good faith within the purview of the act; that he did not settle upon the land for agricultural purposes, but, following the line of stakes marking the surveyed route, he sought to take from the grant the most valuable one hundred and sixty acres conferred upon said company. And, as we have seen, courts of equity refuse to disturb titles in aid of fraud and wrong.

The fifth assignment of error is with reference to the construction given the act of congress of April 21st, 1876.

Griffey testifies (T. R. p. 92-3) that after the adverse rulings of the department, cancelling his pre-emption entry, in July, 1857, in 1869 or 1870 a bill for his relief was introduced in congress, and ~~filed~~ failed.

This congress by its act ratified the construction placed upon the act of 1856 by the land department, sustained the decision of the commissioner and denied the title to Griffey for the land in suit. Twenty-three years after the cancellation of Griffey's pre-emption entry, and seventeen years after the land had been certified to the state of Iowa as inuring to the railroad company under the grant, and nine years after the land had been patented to the railroad company, Thomas L. Griffey, by his attorneys, Curtis & Earle, made application to the commissioner of the general land office for reinstatement and confirmation of his entry under the act of congress approved April 21st, 1876. T. R. p. 102-3-4.

Upon the hearing of this application the commissioner ordered the land patented to said Griffey, and upon appeal the secretary of the interior sustained the decision of the commissioner, and the patent issued on the 30th day of June, 1882.

The defendant's right to the land in suit depends upon the construction of the act of congress of April 21st, 1876.

An examination of the first section of the act discloses that it relates to land whose status under the grant could be affected by the date when notice of the withdrawal of land from market was received at the local land offices where the land was situated.

This could have no reference to lands which passed under the act of May 15th, 1856, for under that act the definite location of the line of road fixed the grantee's rights to the land in place, and the courts have repeatedly held that the plaintiff's rights did not depend upon the withdrawal of the lands within the granted limits.

B. & M. R. R. Co. vs. Boston, supra.

Blair Town Lot & Land Co. vs. Kitteringham, 43 Ia., 462.

In a large class of grants it is made the duty of the secretary of the interior upon filing of the map of definite location of the line of road, to withdraw from market the lands granted by the act. With homestead and pre-emption entries made before such withdrawal the act of April, 1876, has to do.

Under the grant of May 15, 1856, the title became vested in the state and the company to the lands in place without the interposition of the secretary upon acts to be subsequently done by the company.

It was the duty of the department to reserve the land for the purposes of the grant immediately upon the passage of the act.

See Walcott vs. Des Moines River Co. 5 Wall. 688.

And such was the action of the department in reference thereto. The lands granted under the act of May 15, 1856, were at once withdrawn on the passage of the act, and no act of the department holding said lands subject to pre-emption or homestead entries, after the grantee's rights attached, can affect the plaintiff's rights.

To sustain Griffey's entry the act of April 21, 1876, must be held retroactive and to divest vested rights.

The courts have repeatedly held the laws will not be so construed as to make them retroactive or divest vested rights.

In the case of Dash vs. Vankleeck, 7 Johnson, 477, the court lays down well settled rules for the construction of statutes, among which are:

"That a statute is not to be construed so as to work destruction of a right previously attached."

"The court will presume, out of respect to the law giver, that the statute was not meant to operate retrospectively."

In Newland vs. Marsh, 19 Ill. 384, the court lay down a rule of construction to be applied in construing statutes similar to the act of April, 1876, and say: "Whenever an act of the "legislature can be so construed and applied as to avoid con- "flict with the constitution, and give it the force of law, such "construction will be adopted by the courts. Therefore the 'acts of the legislature, in terms retrospective, and which, "literally interpreted, would invalidate and destroy vested "rights, are upheld by giving them prospective operation only; "for, applied to and operating upon future acts and transactions "only, they are rules of property under and subject to which "the citizens acquire property rights and are obnoxious to no "constitutional limitation; but as retroactive laws they reach to "and destroy *existing* rights, through force of the legislative "will, without a hearing or judgment of law. So will the acts "of the legislature having elements of limitation, and capable "of being so applied and administered, although the words are "broad enough to, and do, literally read, strike at the right "itself, be construed to limit and control the remedy; for as "such they are valid, but as weapons destructive of vested "rights they are void; and such force only will be given the act "as the legislature could impart to them."

Cooley on Constitutional Limitations, 3d Ed. p 236, after an exhaustive examination of the decisions of the courts, lays down the rule established to be: "That the government has no power to revoke a grant, even of its own funds, when given to a private person or corporation for special uses."

In Fletcher vs. Peck, 6 Cranch, 137, the court say: "A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert that right."

In Wright vs. Hawkins, 28 Texas, 471, the court say: "The proposition is not maintainable that the legislature may, as long as the legal title remains in the state, make such disposition of the public domain as it may deem fit, irrespective of the equitable right or titles of individuals."

2 Story on the Constitution, paragraphs 1376-7.

The constitution embraces and applies to executed and executory contracts, to express and implied contracts, and a law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contracts, necessarily impairs it." The same, section 1385, "Contracts and grants made by a state are not less within the reach of the prohibitions, than contracts and grants of private parties." The same, section 1391.

In the case of

Ferret et al vs. Taylor et al, 9 Cranch, 50,

the court say: "If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine, that a legislative grant is revocable in its own nature, and held only *durante bene placito.* Such doctrine would uproot the foundation of almost all the land titles in Virginia, and is entirely inconsistent with a great and fundamental principle of a republican government—the right of the citizens to the free enjoyment of their property legally acquired."

In Richards vs. Phelps, 6 Wall. 165, the court say: "Congress is bound to regard the public treaties, and it had no power to organize a board of revision to modify titles confirmed many years before by the authorized agents of the government."

See also Dartmouth Col. vs. Woodward, 4 Wheaton, 694.

Strong vs. Lehmer, 10 Ohio St. 100.

Morton vs. Nebraska, 21 Wall. 673.

Hubbard vs. Brainard, 35 Conn. 563.

The Bridge Propr's vs. The Hoboken Co. 1 Wall. 116.

This act has several times been construed by the courts, and the uniform holding has been that it cannot divest a party of rights vested, hence can have no application to case at bar.

This court, in the case of the B. & M. R. R. Co. vs. Law-

son, *supra*, construing the act of April 21, 1876, says: "What land grants may be referred to by this act we are unable to determine, nor is it necessary that we should do so. It is enough to say that the act can have no application to lands like those in controversy in this case, where the title had passed from the United States years before the passage of the act under consideration. By the acts of 1856 and 1864 the rights of the railroad company did not depend upon the withdrawal of the land, nor upon notice of such withdrawal. When the line of the road was definitely fixed the lands were not subject to homestead entry, and an enterer could acquire no rights against the grantee under the act."

Blair Town Lot & Land Co., vs. Kitteringham, 43 I., 462.

Judge McCrary, in the case of Tabrock vs. The B. & M. R. R. Co. *supra*, speaking in reference to the same act, says: "It "does not in my opinion apply to a case where, prior to any "such pre-emption or homestead entry, the land had been spec-"ially granted by an act of congress, and had fully vested in "the grantee. To give such a construction would be equivalent "to saying that congress intended to take lands from an owner "whose title was perfect and confer them upon another. * * "The act of congress was itself a grant as well as a law, and had "all the force of a patent. When the condition (the definite "location of the line) was performed the title became absolute."

The supreme court of Kansas, in passing upon the same act in the case of John Englie et al vs. Martha E. Young, say: "Further, we think the re-instatement of the Starbrook entry, "under the provisions of the act of 1876, a mistake of law, as the "title of the railroad company vested in the particular tract on "June 30, 1869, by the route of the road being then definitely "fixed. This vested title could not be disturbed by a subse-"quent act of congress."

"A patent," says the court in United States vs. Stone, 2 Wall, 525, "is the highest evidence of title, and is conclusive as "against the government and all claiming under junior patents "as titles until it is set aside or annulled by some judicial tri-"bunal."

In Moors vs. Robbins, 96 U. S., 523, the court says: "The functions of the executive department necessarily cease when the title has passed from the government. And the title does

so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the president and sealed and delivered to and accepted by the grantee. It is a matter of course that after this is done neither the secretary, nor any other executive officer, can entertain an appeal. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded."

"When the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office."

See United States vs. Schurz, 102 U. S., 378.
Bucknell vs. Comstock, 113 U. S., 149.
Monery vs. Whitney, 81 U. S., 434.

A congressional grant and the certification to the state of lands which pass under the grant has the same force and effect as a patent duly executed, and passes the full legal title to the lands so certified.

So the act of congress approved August 3, 1854, (Lester's Land Laws, vol. 1, p. 236) provides, and the courts, both state and federal, have uniformly held.

See C. B. & Q. R. R. Co. vs. Lewis, 53 Iowa, 107.
Johnson vs. Thornton, 54 Iowa, 149.
Langdeau vs. Hanes, 88 U. S., 521.
Ryan et al vs. Carter et al, 93 U. S., 78.
Whitney vs. Morrow, 112 U. S., 693.

Under the decisions the full legal title to the land in suit had vested in the state of Iowa in trust for the railroad company, nearly twenty years before the patent issued to Griffey, and the question whether the land was wrongfully certified under the grant could only be determined by the courts in appropriate proceedings brought to determine that question.

The officers of the land department had no jurisdiction to review and determine the question passed upon by their predecessors, nearly thirty years before, and divest the state and its grantee of the title certified to it in April, 1863. The patent, then, issued to Griffey for land the government had not owned

for more than a quarter of a century, is a nullity and confers no title upon the grantee therein.

United States vs. Schurz, 102 U. S., 378.

In conclusion, we claim that, in the absence of any provision in the grant, the land department and the railroad company had the power to determine how the location should be fixed, and what evidence of that fact should be furnished, and when it should be furnished. The contract between the government and the railroad company was indefinite on this point, but the officers of the government and the agents of the railroad company had the power to fix the mode and terms of adjustment.

The defendants do not stand in a position to question the propriety of the mode or the power of either party to make it, because their rights are subsequent and when the acts were performed they had no interest in the land.

We claim that this question has never been decided by this court. The question of the true date of location, in the absence of all provisions in the grant, is a new one in this court. What has been said *arguendo* cannot be used as the basis for invoking the doctrine of *stare decisis*. There is no law governing this question; it is simply a matter of interpretation in accordance with justice and right.

The question is, when was the final location made? The filing of the map is not a declaration of location, it is simply one form of evidence of what had before been declared. The actual visible stakes along the ground is the best evidence. For instance, if the company had staked a line seven miles south of the line indicated by the map, and the map was filed prior to Griffey's entry, what evidence would control in determining the question as to the true location of the line, in a contest with Griffey?

We believe it would be held that, in the absence of some provision of law, the company was bound by their actual line of stakes, and that it could obtain no right by a map which was not true evidence of the fact.

The location is the controlling fact, and the map is only evidence of it, but not the only evidence. By some of the grants congress says, This shall be the only admissable evidence; and in such cases this court has held that the companies must com-

ply with this provision of the grant before their rights to the land could attach.

But where it is not so provided this court ought not to reject better evidence. The line of stakes is the best evidence. These were made by the authorized agents of the company, and was the act of the company. The confirmation of this act by the officers of the company was not a new act, but simply the ratification of an act previously authorized. The act was done when the decision was made as to where the line should be; all after acts is simply evidence of that great controlling fact.

The further filing of the map was only another declaration of what had been done before, and did not operate to change the date of what had before been done, but simply furnished another form of evidence to the department, so that it could act intelligently in adjusting the grant.

We make the broad claim that, as the grant did not require us to file a map, no other power can; that our rights are measured by the grant, and if the company had never filed a map it could still have held its lands from the date of final location.

It is true that the government was entitled to some evidence, as to the line of location, within a reasonable time, so that the rights of the public would not be jeopardized by the delay, but if the evidence had been furnished in some other form it would have been just as competent and equally binding on the government. For instance, had the line of location been shown by description of parallels, curves and tangents describing the sections and subdivisions crossed, who would say that this was not sufficient? What power but congress has a right to amend the grant and insert a provision it did not originally contain? What court could legislate a vital provision into the grant, especially after many years had passed and the company had no opportunity of complying with the unforeseen amendment?

We claim that the filing of the map was an entirely voluntary proceeding on the part of the company, and that the date of performance of a voluntary act cannot be made the foundation of all our right.

If the map was not essential to the vesting of our rights, then the date of its filing is absolutely immaterial.

This case is distinguishable from all others decided by this court on this proposition: In all other cases the filing of the map was made the foundation of the right by the terms of the grant; in this case it was voluntary. The reason and principle ~~cipal~~ that applies to one does not apply to the other.

It is just and right that a company should comply with the act under which they hold. It would be unjust to deprive a company of its lands for failing to comply with a provision legislated into the act thirty-five years after it became too late to comply.

The company acted with promptness. It cannot be charged with laches in its dealings with the public. It fully complied with all the rules and regulations of the department, and it fulfilled all the conditions of the grant. There is no equitable reason why it should be deprived of its lands.

W. L. JOY, Plaintiff's Solicitor.

FILED
JAN 12 1892

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

No. 157.

THE SIOUX CITY & IOWA FALLS TOWN LOT AND LAND COMPANY,
Plaintiff in Error,
vs.
THOMAS L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. TREDWAY, JOHN M. TREDWAY, WILLIAM W. CURTIS, GEORGE EARLE AND SAMUEL S. BURDETT,
Defendants in Error.

In Error to the Supreme Court of the State of Iowa.

ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM C. GOUDY,
FOR PLAINTIFF IN ERROR.

IN THE

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Defendants in Error.

In Error to the Supreme Court of the State of Iowa.

STATEMENT.

On the 29th day of June, 1883, the complainant, the Sioux City and Iowa Falls Town Lot and Land Company, filed a petition in equity in the District court of Woodbury county, Iowa, against Thomas L. Griffey, Charles Chamberlain, O. C. Tredway, John M. Tredway, William Curtis, George Earle and Samuel S. Burdette to quiet the title to the north-west quarter of section 27, township 89 north, of range 47 west of the 5th principal meridian, and to obtain an injunction against the defendants to prevent their interference with the possession of said premises.

The complainant claimed title to the land by the following chain of title:

1. An act of Congress, approved May 15, 1856, entitled "An act making a grant of land to the State of Iowa in alternate sections having odd numbers to aid in the construction of certain railroads in said state," granting lands to the State of Iowa to aid in the construction of four railroads.

2. An act of the General Assembly of the State of Iowa, approved July 14, 1856, entitled, "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act making a grant of land to the State of Iowa in alternate sections to aid in the construction of railroads in said state," granting lands to the Dubuque and Pacific Railroad Company, a corporation organized and existing under the laws of Iowa.

3. July 5, 1856, the line of the Dubuque and Sioux City Railroad was surveyed, staked out and definitely located on the land through Woodbury county and within a few rods of the tract of land in controversy. The corporation was in existence and part of the road from Dubuque was constructed before the act of Congress was enacted. All of the unappropriated lands in sections designated by odd numbers in the six mile limits on each side of the railroad were required to fill the grant, and, also, all of the unappropriated lands in the fifteen mile limits were necessary, and still there was not sufficient land to make the full and complete grant.

4. April 7, 1863, the Secretary of the Interior approved and certified lands to the State of Iowa under the act of Congress of May 15, 1856, for the use of said railroad, and included in this certificate was the land in controversy in this suit.

5. A conveyance by the Dubuque and Pacific Railroad Company to the Dubuque and Sioux City Railroad Company August 21, 1860, in pursuance of a decree of August 18, 1860, of the District court of Dubuque county, Iowa.

6. An act of Congress approved March 2, 1868, entitled: "An act extending the time for the completion of the Dubuque and Sioux City Railroad," which extended the time for the completion of the line from Dubuque to Sioux City until January 1, 1872."

7. A contract os January 7, 1868, between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company.

8. An act of the legislature of Iowa approved April 7, 1868, entitled: "An act to legally confirm and carry out a contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls and Sioux City Railroad Company, and to extend the time for completing said railroad from Dubuque, Bellevue and Sabula Railroad Company for the building of the Tete des Morts branch and for other purposes."

9. After the Iowa Falls and Sioux City Railroad Company had constructed its railroad within the extended time, the State of Iowa issued a patent for the land in controversy in this suit tosaid railroad company, dated July 5, 1871, which was recorded in Woodbury county August 25, 1871.

10. June 9, 1871, the Iowa Falls and Sioux City Railroad Company conveyed by warranty deed the land in suit to C. C. Vail.

11. June 10th C. C. Vail conveyed the land to J. I. Blair.

12. July 7, 1881, J. I. Blair conveyed the land to the Sioux City and Iowa Falls Town Lot and Land Company, the plaintiff in the suit below and the plaintiff in error in this court, and the deed was recorded August 7, 1881.

The defendants filed an answer to the petition, and claimed title by the following chain:

1. July 19, 1856, the defendant, Thomas L. Griffey, claimed to have filed papers under the pre-emption law of 1841.

2. September 5, 1856, an entry by Griffey, at the local land office in Sioux City, upon alleged proofs of a compliance with the pre-emption law.

3. July 7, 1857, the entry of Griffey was canceled by the Commissioner of the General Land Office.

4. A patent of the United States to Thomas L. Griffey for the land in controversy, claimed to have been issued under the provisions of an act of Congress of April 21, 1876.

5. The defendant, Charles Chamberlain, claims an undivided one-half as heir of George W. Chamberlain, to whom the defendant Griffey conveyed Jany. 10, 1857. The other defendants claim a conveyance of an undivided one-fourth as a contingent fee for their professional services in obtaining the patent for the land.

The answer of the defendant prayed affirmative relief and asked that the certification of the land of the United States to the state, April 7, 1863, and the patent from the State of Iowa to the Iowa Falls and Sioux City Railway Company of July 5, 1871, be set aside, and that the other deeds constituting the title of the complainant be also set aside and declared null and void, and the defend-

ants' title be established and confirmed. By the practice in Iowa such a prayer in an answer was treated as a cross-bill for affirmative relief.

The cause was heard upon the pleadings and evidence by the District court of Woodbury county, Iowa, and on the 27th day of March, 1886, a final judgment and decree was entered, denying the plaintiff any relief, and granting the defendants the relief demanded in their cross-bill and counter-claim. The plaintiff's bill was ordered to be dismissed, and it was decreed that the defendants were the absolute owners in fee of the premises in controversy, and that their title be confirmed as against the plaintiff, and all persons claiming under it. An appeal was prosecuted to the Supreme court of Iowa. (Rec., 113, 114.)

On the hearing of the appeal, the Supreme court affirmed the judgment and decree. (Rec., 143.) An opinion of the Supreme court was filed, delivered by Seevers, Justice, in which it was held that Griffey's right attached to the land on the 19th day of July, 1856, and that the grant by Congress to the State of Iowa did not take effect on the survey, staking and location of the road on the ground, but that such grant under the law cannot take effect until the filing of the plat of such location in the general land office, October 13, 1856. It was also held in said opinion that Griffey obtained a valid preemption right which he proved up, and entered the land September 5, 1856, and the legal title was conveyed to him by the patent of 1882. (Rec., 140.)

From this judgment of the Supreme court of Iowa the plaintiff, the Sioux City and Iowa Falls Town Lot and Land Company has prosecuted a writ of error to this court. The errors assigned are presented in the argu-

ment of Mr. Joy, who appears for the plaintiff in error, and it is not necessary to repeat them here.

The statement of the facts necessary for the consideration of the points which I shall make, will be stated in the course of the argument.

Part I.

THE COURT BELOW ERRED IN GRANTING AFFIRMATIVE RELIEF TO DEFENDANTS AND CONFIRMING THEIR TITLE TO THE LAND, AND SETTING ASIDE THE PLAINTIFF'S TITLE.

According to the practice in Iowa, the defendants set up a counter-claim in their answer and prayed for affirmative relief. In the payer, at the end of the answer, they asked that the plaintiff's title be set aside and declared null and void, and that the defendant's title be allowed, confirmed and established by decree to be free and clear of any claim of the plaintiff. (Rec., 23.)

The court, in entering a final decree, held that the plaintiff was not entitled to relief and that the defendants were entitled to the relief demanded in their cross-bill and counter-claim, and ordered that the plaintiff's petition be dismissed. It was further decreed that the defendants were the absolute owners in fee of the premises in controversy, viz.: That the defendant, Griffey, was the owner in fee of an undivided one-quarter, the defendant Chamberlain of an undivided one-quarter, the defendant Treadway of an undivided one-quarter, and the defendants Curtis, Earle and Burdette of an undivided one-quarter, and that the title of said defendants be confirmed against the claims of all parties claiming by, through

or under the plaintiff, and that the plaintiff be barred of all interest therein, and its title was adjudged null and void. (Rec., 113.)

The defendants, according to the pleadings and practice, occupied the position of complainants in a court of equity, and could only obtain the relief which was allowed upon the principles applicable to complainants in such a court.

The case naturally divides itself into two parts.

First: Did the defendants have a good title to the land, which justified the court in confirming it as against the plaintiff? And,

Second: Did the plaintiff have a good title to the land, and was it entitled to the relief asked in the petition?

1. *The patent to Griffey was issued without authority of law, and standing alone does not establish any right in the defendants.*

A patent was issued by the State of Iowa to the Iowa Falls and Sioux City Railway Company, conveying, among others, the quarter section of land in controversy in this suit, which is dated July 5, 1871, and was recorded in Woodbury county, August 25, 1871. The plaintiff in error claims by deeds from the Iowa Falls and Sioux City Railway Company. (Rec., 52.)

On the 7th of April, 1863, the Secretary of the Interior approved and certified a list of lands, including the tract in the suit, to the State of Iowa, under the act of congress of May 15, 1856, granting to the state lands to aid in the construction of four railroads, one of which was the Dubuque and Sioux City railroad. (Rec., 3, 15.

The Iowa Falls and Sioux City Railway Company ac-

quired the title of the Dubuque and Sioux City Railroad Company. (Rec., 52.)

The road was surveyed, staked and located on the surface of the ground, between May 30 and August 31, 1856, under a resolution of the board of directors of May 26, 1856. (Rec., 48–53.)

That part of the railroad near Sioux City was surveyed, staked and located on the surface of the ground on the 5th of July, 1856. (Rec., 2, 12, 13.)

A map of the location of the line of railroad for the entire route from Dubuque to Sioux City, with the certificates attached thereto, dated September 27, 1856, was filed in the General Land Office October 13, 1856. This showed the times of the location of different parts of the line. (Rec., 42, 54.)

The legal effect of the act of Congress and the several things that were done, ending in the patent by the State of Iowa, dated July 5, 1871, to the Iowa Falls and Sioux City Railroad Company, was to vest the title in that railroad company, precisely the same as if the United States had issued a patent directly to the railroad company. After that time the United States had no title left in it to convey to any other person.

Notwithstanding the fact the United States had been divested of its title, and that it had been transferred and conveyed, on the 13th day of June, 1882, a patent was issued by the United States to Thomas L. Griffey, one of the defendants, purporting to convey to him the quarter section in controversy in this suit. (Rec., 138.)

On this state of facts the patent to Griffey was void. There was no authority in the officers of the United States to issue or grant the same. If the former grant to the

railroad company was unlawful the only way in which that question could be presented and decided was by a resort to the courts. There was no authority in the executive officers of the government to determine the respective rights of the parties claiming title to the land. The fact that a patent was issued and granted to Griffey is not evidence that it was rightfully issued. And if no further testimony is presented except the acts of Congress, the patents and deeds, a court would be compelled to decide in favor of the elder patent. If this proposition is correct, then the rights of the parties in this litigation must be determined upon the facts presented in evidence without any aid from the patent issued to Griffey.

In *Ryan* v. *Carter*, 93 U. S., 81, there was a controversy between parties claiming from Dodier, to whom the tract was confirmed by commissioners appointed under an act of Congress. It was insisted by the plaintiff that this confirmation only vested an equitable title, and, by the defendant, that the fee passed directly to him in 1812 by operation of an act of June 13, of that year. The court, speaking of the act of Congress, say:

"It does not require the production of proofs before any commission or other tribunal established for that purpose, but confirms, *proprio vigore*, the rights, titles, and claims to the lands embraced by it, and operates as a grant, to all intents and purposes. Repeated decisions of this court have declared that such a statute passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law, as well as by a patent pursuant to a law." (*Ib.*, 82.)

In *Whitney* v. *Morrow*, 112 U. S., 695, the court, referring to an act of Congress granting lands, says:

"If there were any difference in the grade of the two

conveyances of the government—that by a direct legislative act, and that by officers acting under provisions of the statute—it would seem that there should be greater weight and dignity attached to the legislative grant, as proceeding more immediately from the source of title than the patent. No impeachment can be had of the motives of the legislature, whereas, the motives of officers employed to supervise the alienation of public lands may sometimes be questioned, as in proceedings to set aside their action. Still, if the law be complied with, the title passes as completely in the one case as in the other. *Montgomery* v. *Bevans*, 1 Sawyer, 653, 677."

An act of Congress approved August 3, 1854, provides:

"That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several states and territories, and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been, or may hereafter be, certified by the Commissioner of the General Land Office, under the seal of said office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby."

Giving effect to that act of Congress the Supreme court of Iowa decided that a list of lands selected by the agent of the government of the state and approved by the secretary of the commissioners, was competent evidence to prove title the same as if a patent had been issued therefor.

C., B. & Q. R. R. Co. v. *Lewis*, 53 Iowa, 107.

To the same effect is

Johnson v. *Thorton*, 54 Iowa, 149.

This principle is also recognized in

Langdean v. *Hanes*, 21 Wallace, 529.

These cases establish the proposition that the railroad company had the elder grant, and, if so, then it must follow that the subsequent patent to Griffey was void.

In *Moore* v. *Robbins*, 96 U. S., 532, in discussing this question the court say:

"The Supreme court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the Land Department, including the Secretary of the Interior, the acts of Congress had confided the determination of this class of cases; and the decision of the secretary in the favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of contest, the courts are bound by it and must give effect to it.

Robbins v. *Bunn*, 54 Ill., 48.

"Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that where there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and ac-

cepted, all right to control the title or to decide on the right to the title has passed from the land office; not only has it passed from the land office but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, it delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annull the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper cause.

"'A patent,' says the court in *United States* v. *Stone*, (2 Wall., 525), 'is the highest evidence of title, and is conclusive as against the government and all claiming

under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy.' See also *Hughes* v. *United States*, 4 Wall., 232; s. c., 11 How., 552.

"If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

"But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

"If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect, exists in the Executive Department,

it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded.

"The order of the Secretary of the Interior, therefore, in Moore's case was made without authority, and is utterly void, and he has a title perfect both at law and in equity."

The case of *United States* v. *Bell Telephone Company*, 128 U. S., 364, contains similar language to the above.

In *Gilmore* v. *Sapp*, 100 Ill., 297, it appeared that a tract of land was entered in pursuance of a pre-emption claim October 6, 1834, by Henry Swisher, and a certificate of entry was issued to him. Subsequently a patent was signed but not delivered from the General Land Office, on the 15th of July, 1837, and a commissioner of the General Land Office set aside and canceled the purchase. Gilmore, on January 12, 1875, made an entry of the same land and procured a patent from the commissioner of the General Land Office. The question arose as to the effect of this patent issued to Gilmore as against persons claiming under Swisher; the court say:

"If, then, as held by that court, the fee simple title vested in Swisher when the patent was recorded, we are aware of no means by which he could be involuntarily deprived of his title, except by a judicial proceeding. That is the only means known to the law. The legislative power of the government is not competent to transfer title from one person to another, nor to the government. That is beyond its power. That branch of government can only declare what acts of the owner may authorize the courts to declare that the title shall be transferred.

Hence it follows that legislative authority is incompetent, if it would, to confer such power upon a mere ministerial officer, and any effort by such an officer to cancel a patent which transfers title to a grantee, and re-invest the title in the government, is absolutely void, and can affect the rights of no one. Such an officer, under the division of the powers of our government, possesses no such authority, and can be invested with no such functions. The act, then, of the commissioner of the general land office, in setting aside and annulling the entry and patent, was void, and did not produce the slightest effect on the title of Swisher." (*Ib.* 303.)

In *United States* v. *Schurz*, 102 U. S. 401, an application was made for a mandamus to compel the delivery of a patent for lands. The court, after holding that the title vested in the patentee when the patent was signed and recorded, then proceeds to consider the question as to the power of the executive officers over the title after that event. It is there said:

"The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside or correct it if only partly wrong. It is within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

"From the very nature of the functions performed from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title."

See, also,

Becknell v. *Comstock*, 113 U. S., 151.
U. S. v. *Stone*, 2 Wall., 525.

2. *The act of April 21, 1876, did not authorize the issue of the patent.*

But it is claimed that the issue of the patent to Griffey in 1882 was authorized by an act of Congress of April 21, 1876. The first section of that act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, with the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead

laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

Even if the acts of Griffey came within the language of this act of Congress, it would not be effectual for divesting the title of the elder grantee. It is not in the power of a legislative body to take the title from one person and invest it in another.

Ferret v. *Taylor*, 9 Cranch., 50.

In *B. & M. R. R. Co.* v. *Lawson* (58 Iowa, 145), there was a controversy between the railroad company, claiming under an act of Congress of 1864, granting lands in aid of the construction of a railroad, and a person who had applied to enter the land, claiming that it was not included in the grant. It was insisted that the act of April 21, 1876, embraced the case before the court. It was held that the title vested in the railroad company according to the provisions of the act of Congress granting the land in aid, and that the act of April 21, 1876, did not apply. It was there said:

"What land grants may be referred to by this act we are unable to determine, nor is it necessary that the act can have no application to lands, like those in controversy in this case, where the title has passed from the United States, years before the passage of the act under consideration."

In *Taboreck* v. *B. & M. R. R. Co.*, 2 McCrary, 409; 13 Fed. Rep., 104, Judge McCRARY, referring to the act of April 21, 1876, says:

"It does not in my opinion apply to a case where, prior to such pre-emption or homestead entry, the land has

been specially granted by an act of Congress, and had fully vested in the grantee. To give such a construction would be equivalent to saying that Congress intended to take lands from an owner, whose title was perfect and confer them upon another. * * * The act of Congress was itself a grant as well as a law, and had all the force of a patent."

In *Emslie* v. *Young*, (24 Kansas, 732), the Supreme court of Kansas, speaking of the act of April 21, 1876, say:

"Further, we think the re-instatement of the Starbrook entry, under the provisions of the act of 1876, a mistake of law, as the title of the railroad company vested in the particular tract on June 30, 1869, by the route of the road being then definitely fixed. This vested title could not be disturbed by a subsequent act of Congress."

The act of April 21, 1876, does not embrace the claim of Griffey, and there is no evidence that the facts existed which brought him within its provisions. In order to justify the Commissioners of the General Land Office in issuing a patent, it was necessary that the following conditions should exist and be proven:

First. That the pre-emption of Griffey was in compliance with the law of the United States.

Second. That the pre-emption claim was made in good faith by an actual settler.

Third. That the pre-emption entry should have been made prior to the time when notice of the withdrawal of the land was received at the Local Land Office, or after their restoration to market by order of the General Land Office.

Fourth. That the pre-emption laws had been com-

plied with and proper proofs thereof had been made by Griffey.

There is no evidence in this record showing that Griffey presented to the Commissioner of the Land Office evidence as to any one of these requirements.

There is an entire absence of any testimony upon these several points, but there is evidence to the contrary as to some of the material elements.

The alleged pre-emption was under the act of 1841. This court has held that the object of that act was to enable actual settlers by residence, who should enter upon the lands in good faith to make it a permanent home, to acquire a prior right to make entry thereof.

Bohall v. *Dilla*, 114 U. S., 51.
Atherton v. *Fowler*, 96 U. S., 518.

It is claimed that Griffey entered on the land on the 19th day of July, 1856, and erected a dwelling-house thereon; that he moved into the house on the first or second day of September, 1856, and remained there with his family for three days, when he left the premises and returned to his residence in Sioux City.

The testimony of Griffey himself, which was the only evidence offered on the point in this case, shows that he lived with his wife and one or more children in Sioux City; that he had a trading post about two miles south of Sioux City; that he kept a saloon, and also had a license to practice law. In the year 1857, he removed to the west of the Missiouri river and never afterwards lived east of that river.

He says that he lived in Sioux City in a small house of Dr. Cook's, west of Perry creek, at the time he made the settlement. On the 19th of July, 1856, he built a shanty

of pine boards, 14 x 16, and divided it into two rooms. He covered the house with pine lumber. He had two windows and a door on one side of the house. He took his family into the house within the first three days of September, 1856, and remained there until the 5th of September, and then he moved his family back to the house he had left in Sioux City. This is the only residence or settlement he had upon the land. He reduced none of it to cultivation. He did not change his business from the place he was conducting it as a trading post, or abandon his saloon, or his practice of law. He took some witnesses to the land on the 5th of September for the purpose of proving that he was there with his family. He was able to remember that he had these witnesses there because of the amount of brandy and cherries it took for the occasion. He never returned to the land, but during that fall or winter he tore down the shanty, hauled it to where he lived in Sioux City and burned it up for fire-wood. The next year he commenced to build another house, but it was never finished or occupied.

It is very clear from this testimony that he did not comply with -the preemption law. He did not make a preemption in good faith, for the purpose of reducing the same to improvement, or using it for a residence. He was not an actual settler. What he did was in fraud of the law. His improvements, such as they were, were a mere pretense, to enable him to assert a claim in the land office, and to obtain a title in advance of the railroad company. He knew, according to his statement, that prior to the time that he built this shanty, the engineers of the railroad had made a survey of the land and located the railroad on the surface of the ground, and his effort was to forestall the railroad company and get a

prior right of entry near the line of the railroad, and adjoining Sioux City. We may well imagine that there was more or less excitement about the city over the proposed construction of the new road to the Missouri river, and it was the undoubted belief of those who knew of the proposed road, that the land in question would become very valuable.

There is not only an absence of proof that any testimony such as required by the act of 1876 was presented to the Commissioner of the General Land Office, but there was no proof on the hearing of this case that Griffey had a valid preemption claim, or that he complied in any respect with the act of Congress. The only evidence offered was a certified copy from a book in the local land office at Des Moines of an abstract of declaratory statements filed in the land office at Sioux City in 1885, which appears to be a tabular statement, purporting to show the number of statements filed, the date of settlement, the day when filed, the name of a person, the description of the land; and another table which shows a description of land, the number of acres, the name of the purchaser, with the memorandum, "Located, 5th September, 1856, by Thomas L. Griffey, Ass. under M. B. L. W. T. No. 53493, Act of 1855." (Rec., 82, 83.)

It may well be questioned whether these certified copies or statements are evidence for any purpose, but even if received for all that they are worth, they do not show that there was any compliance with the pre-emption law, nor that there was any certificate of entry ever issued by the register to Griffey. If there was a declaratory statement such as required, and if affidavits had been filed, making proof of settlement, these papers should have been introduced; either the originals or certified copies from

the land office. There is no sufficient evidence introduced to establish the pre-emption right of Griffey, or that he entered the land as a pre-emption claimant.

For these reasons there was no authority in the executive officers of the government to issue the patent to Griffey. It furnishes no evidence of title, and as it appears that there was a prior grant of the land, this patent is void.

3. *The defendants were not entitled to relief in a court of equity, and the decree confirming their title and declaring the title of the plaintiff to be null and void, was erroneous.*

It is not necessary in this court to cite authorities to sustain the proposition that a party must come into a court of equity with clean hands, and that he must show himself entitled, according to the rules of such a court, to the relief demanded. Before an inquiry can be made as to the rights of the complainant he must show that he occupies a position which justifies the court in giving audience to his complaint. It may be that the defendant has neither legal or equitable rights, but a stranger, or one who has no rights in regard to the matter in controversy cannot be heard.

This record shows an entire want of proof that Griffey complied with the act of Congress so as to entitle him to make an entry of the land. More, the evidence in this case shows that he was not entitled to make such entry. It established the fact that he was guilty of a fraud and endeavored to procure a prior right to the land by false representations and a pretended settlement. It seems, from his own testimony, that he had a claim to land on the west side of the river during the winter of 1856 and '57, be-

cause, he says, when he was not occupied at his trading-post, or his saloon, or in the practice of law, he was engaged in fighting his claim across the river. About that time, he says, that he removed to the west side of the Missouri river. He undoubtedly knew of the proposed construction of a railroad terminating in Sioux City which ran within a few rods of the land he undertook to pre-empt. It appears in other parts of this record that after the road was constructed, the passenger station was erected very near to this land. It adjoined the subdivided part of Sioux City. The survey was made on the 5th of July, 1856, under a resolution of the board of directors authorizing the location on the line selected, and the road was marked by stakes driven in the ground. There was no intention, as appears by the evidence, on the part of Griffey to reduce this land to cultivation or to reside thereon. This case is one of many where an effort was made to acquire land by pre-emption contrary to the terms and spirit of the act of Congress. It is not pretended that there was any purchase of the land from the United States by a sale and entry. The only claim of Griffey was based on the fraudulent and pretended settlement on the land under the pre-emption laws.

Suppose that a suit could be maintained against the United States by Griffey for the purpose of compelling the issue of a patent to him, and these facts should appear in evidence in that suit, would he have a standing in a court of equity for an instant in the maintenance of such a claim? Most clearly not. On the contrary, on such a state of facts, the court, if it had the power, would not only deny relief, but would set aside the pretended claim and entry. It is to be borne in mind that the Commissioner of the General Land Office did vacate this en-

try and pre-emption claim July 7, 1857, a few months after it was made. Therefore, before Griffey could be entitled to a conveyance by patent he would be obliged to show by sufficient and competent evidence not only that he was entitled to a patent, but that the act of the Commissioner of the General Land Office in annulling his claim and entry was erroneous and without authority of law.

A mere statement of these facts would be sufficient to show that Griffey was not entitled to a decree establishing his title to the land, such as was rendered by the District court of Woodbury county, Iowa. That portion of the decree is clearly erroneous and it should be reversed.

The defendants other than Griffey occupied no better position before a court of equity than Griffey himself. It appears that a deed for an undivided one-half was made by Griffey to Chamberlain, Griffey stating that it was made because he was united with him in establishing the pre-emption. Conveyances were made to the other defendants, according to the testimony of Griffey, as compensation for their services as attorneys in procuring his patent in 1882. It seems from the evidence that these attorneys undertook to procure the patent upon a contingent fee and to receive their payment by a conveyance of an undivided one-half of the land. This act was unlawful, and was contrary to the common law which prohibits champerty and maintenance. They were not purchasers for for any valid consideration. They received a conveyance as compensation for asserting and establishing a fraudulent claim to the land. It follows, therefore, that the decree so far as it established the title of these defendants, other than Griffey, to the land was erroneous and should be reversed.

The principle applicable to this case is established by repeated decisions of the courts. It is sufficient now to refer to the case of *Bohall* v. *Dilla*, 114 U. S., 50. That case in most of its features was exactly like the case at bar. The plaintiff held a patent for land issued to him under the pre-emption laws, and he brought a suit to recover possession of the land. The answer of the defendant set up by way of cross-complaint various matters which, he insisted, constituted in equity a good defense to the suit and entitled him to a decree; that he had an equitable right to the premises and that the plaintiff held the title in trust for him.

By the practice in California, where this case originated, it was proper to set up as a defense to such action the equitable rights of the defendant, and to obtain a conveyance of the property if he established a right thereto.

There was a controversy between the two parties as to which was entitled to the land depending upon a compliance with the pre-emption laws. A decision was made by the Commissioner of the General Land Office, which was affirmed by the secretary of the interior, which resulted in the issuing of the patent to Dilla. The defendant, Bohall, claimed that he had a prior pre-emption right, and in equity the plaintiff held the title in trust for him.

This court, by Mr. Justice Field, rendered the opinion and said:

"The system of pleading in civil cases in the courts of California permits an equitable defense to be set up in a special count, by way of cross-complaint, in the answer to ae action for the possession of lands. The cross-complaint is in the nature of a bill in equity, and

must contain its material allegations, declaring a case, which, if established, would entitle the defendant to a decree enjoining the further prosecution of the action, or directing that the title be conveyed to him. This equitable defense is, therefore, to be first considered, for, according to its disposition, will the necessity exist for further proceedings in the action at law, in which the legal title of the parties will alone control. *Quinby* v. *Conlan*, 104 U. S., 420; *Estrada* v. *Murphy*, 19 Cal., 248 and 273; *Arguelo* v. *Edinger*, 10 Cal., 150.

We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross-complaint. To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant. *Smelting Co.* v. *Kemp*, 104 U. S., 636, 647; *Boggs* v. *Merced Mining Co.*, 14 Cal., 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee. It is plain that the defendant, Bohall, did not bring himself within the provisions of the pre-emption laws. Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement, and the erection of a dwelling thereon.

"This implies a residence both continuous and personal. No such continuous residence was shown on the part of Bohall. He was placed in possession of the premises under the judgment of the state court in May, 1868; and it was necessary to prove that he occupied them continuously after filing his declaratory statement. It was shown, however, that he resided elsewhere from July, 1869, to December, 1871, and from April, 1872, to August, 1874. Though he claimed the land for six years, he and his family resided elsewhere during four of them, and no sufficient excuse for such residence was offered. It is only under special circumstances that residence away from the land is permissible. The settler may be excused for temporary absences caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases, the requirement of a continuous residence on the part of the settler is imperative.

"The alleged fraud of Dilla in obtaining possession under the alleged contract, if any such fraud existed, could have had no effect upon the defendant's residence after his restoration to the land in May, 1868.

"As he could not maintain his equitable defense, the plaintiff was entitled to judgment upon his legal title as shown by his patent."

4. *The decree which annulled and set aside the plaintiff's title was erroneous.*

If the court reaches the conclusion that the defendants were not entitled to equitable relief, and that the decree to that extent should be reversed, it follows that the entire decree should be reversed. The defendants had no

legal or equitable title to the land. If so, it was quite immaterial to them whether the plaintiff had a title or not. It might be that this tract of land was still a part of the public domain. Perhaps a suit could be sustained by the United States for declaring that the tract in controversy was not embraced within the grant by the act of Congress of 1856. But these defendants are not the United States, nor the representatives of the United States. They do not occupy a position which justifies them in raising the question as between the government and the plaintiff.

It is most earnestly insisted that no decree could be entered in this case in favor of the defendants and against the plaintiff affecting the title to the land.

In the absence of a valid claim in favor of Griffey and his grantees, the evidence shows that this quarter-section was embraced within the grant made by Congress to the State of Iowa. It was within the twelve-miles limits, six on each side of the railway, as it was located and constructed. There is no pretense that the land was disposed of by the United States in any of the ways mentioned in the granting act, unless Griffey had a right of pre-emption under the pre-emption law which attached to the land. If he did not establish the fact that there was such a claim, then he and his grantees were not entitled to a decree against the plaintiff.

It remains to be considered as to whether the plaintiff could maintain its bill for the confirmation of its title to the land in the present suit, and that involves an inquiry as to whether it was granted by the act of Congress of May 15, 1856, to the State of Iowa, which will be next considered.

Part II.

THE COURT BELOW ERRED IN HOLDING THAT THE PLAINTIFF HAD NO TITLE AND IN DISMISSING THE PETITION.

If the quarter section of land in controversy was in the United States, and no right of pre-emption had attached to the same, it will be conceded that the plaintiff had a good title to it. The question for consideration is, when did the grant vest the title in the state?

The first section of the act of May 15, 1856 (Rec., 26), granted to the State of Iowa, for the purpose of aiding in the construction of certain railroads mentioned therein, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads. It is very clear, as has been frequently held, that this is a grant *in presenti*. There is no condition annexed to it. The act does not require in terms the location of the railroad, nor the filing of any plat showing the route, in any office whatever. The grant is complete and unconditional. The section then proceeds with the following language:

"But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said state to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections, above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands

as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid), shall be held by the State of Iowa for the use and purpose aforesaid." (Rec., 27.)

As an original question it would seem to an ordinary reader that the only object for fixing a definite route was to ascertain the number of tracts which had been disposed of in the manner mentioned by the United States, in order to enable the state by its agents to select an equal number of tracts within the territory specified. It is true that before the number of tracts within six miles on each side of the road could be determined, that it was necessary to fix the location of the road in order to determine the belt of country twelve miles in width in which to count the sections which still belonged to the government, and those disposed of by it. If a contract with such provisions was made between two individuals it would probably be construed so as to prevent the seller from disposing of any of the odd sections of land belonging to him until the route should be fixed and the number of tracts counted.

It would seem to operate as a restraint upon the seller from making any disposition of his property until that act should be performed. But this court has held, so that it is now to be considered as settled law, that a grant of this character did not take effect on definite and particular tracts of land until the route should be located, and that between the time of the passage of the act and the location of the roads, rights might be acquired under the pre-emption and homestead laws of the United States.

It has been held that a fraudulent, abandoned or void pre-emption claim in this interval of time would not defeat the grant to the state, and the title of the railroad company derived through the state.

Emslie v. *Young*, 24 Kan., 732.
No. Pac. Ry. Co. v. *Meadows*, 46 Fed. Rep., 254.
U. P. R. Co. v. *Watts*, 2 Dillon, 310.
Young v. *Goss*, 22 Pac. Rep., 572 (Kan.)
Wright v. *Gish*, 6 S. W. Rep., 704 (Mo.)

This court, however, held in *Hastings and Dakota Railroad Company* v. *Whitney*, 132 U. S., 357, that so long as a homestead entry valid upon its face *remains upon the record* the legality of which has been passed upon by the land officers, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain and prevents it from passing by a grant by Congress.

In that case it appeared that an act of Congress of July 4th, 1866, granted lands in aid of a railroad from Hastings to the western boundary of Minnesota. The railroad company complied with the conditions of the act of Congress and of the state legislature, and on the 7th of March 1867, definitely located its line of road by filing its map in the office of the Commissioner of the General Land Office. The act of Congress provided that if it should appear when the route was definitely located that the United States had sold any section or part thereof, or that the right of pre-emption or homestead settlement had attached to the same, etc., then it should be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States other lands equal to those so sold, reserved or otherwise

appropriated, or to which the right of homestead settlement or pre-emption had attached. (14 Stat. at Large, 87.)

On the 8th of May, 1865, Turner, a soldier in the army made an affidavit and filed the same in the local land office of the district, which purported to be in compliance with the provisions of section 2,293 of the Revised Statutes. The register and receiver allowed an entry, which stood uncanceled upon the records until September 30, 1872, when it was canceled by the proper officers. On the 7th of May, 1877, Whitney entered the land at the local land office as a homestead, and thereafter a patent was issued to her, and she had since been in the actual occupancy of the premises under the patent.

The suit was brought by the railroad company against Whitney and the question arose as to whether the land passed by the grant to the railroad company. This court held that Turner's homestead entry, *remaining uncanceled on the records of the land office* at the time the route of the railroad was definitely located and the grant took effect, excepted the land from the operation of the railroad grant, and that upon the cancellation of that entry the tract did not pass to the railroad company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant, who was the defendant Whitney.

It was contended that the homestead entry of Turner was void upon its face, and it was argued, therefore, that it was a mere nullity and did not prevent the title of the land passing to the state by the grant. The court held that even if that was true, yet that if the application is allowed by the land officers and a certificate of entry is delivered to the applicant, and the entry is made of rec-

ord, that although because of defects in compliance with the law, the entry is afterwards set aside, that it did not render the entry absolutely a nullity. It was said: "So long as it remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants." The court, however, held that in view of section 2,308 of the Revised Statutes, which was a curative act, the homestead claim of Turner was a valid one and in contemplation of law he resided upon the tract of land embraced in his entry at the time it was made. If this is true, it disposed of the case without reference to the other point decided.

It appears from the findings of the court, recited in the opinion that an affidavit was made by Turner, and the contents of such affidavit are given. It further appears that the register and receiver allowed the entry, and made a minute thereof on the records of the local land office, and that the same appeared upon the records of the general land office uncanceled until September 30, 1872. It therefore becomes important to examine the testimony in the case now before the court, to see whether the facts proven brought it within the rule laid down by this court in the Whitney case.

1. *The evidence does not show that a right of preemption had attached to the land in controversy.*

The only testimony introduced by the defendants on this point was as follows:

Abstract of declaratory statements filed in the land office at Sioux City, during the month ————, 1885, on lands which have not been offered at public sale under the President's proclamation.

No. of statement filed.	Date of settlement.	Date when filed.	Name.	Description.	Sec.	Tp.	Range.	Remarks.
*	1856.	1856.		*	*	*	*	
263	July 19.	July 19.	Thos. L Griffey.	N. W. ¼	27	89	47	
*	*	*		*	*	*	*	

Township 89, range 47, district of Sioux City.

Description of Tract.				Contents		Rate per Acre.		Purchase Money.				
Parts of sec.	Sec.	T'p.	R'e.	Ac.	100ths.	Dollars.	Cents.	Dollars.	Cents.	Name of the Purchaser.	Date of Sale.	No. of Receipt and Certificate of Purchase.
N. W. ¼	27	89	47	160	Located 5th September, 1856, by Thomas L. Griffey, ass., under M. B. L., W't, No. 53, 493, act of 1855.							

(Record 82, 83.)

These tables purporting to come from some book kept in the land office were certified by the register of the land office at DesMoines, to which office the books and papers of the Sioux City office had been removed.

No copy of a declaratory statement, no copy of any affidavits as required by the statute making proof of settlement, no certificate of the register of entry of the land, was produced on the trial.

So far as can be ascertained there was no statute which authorized the keeping of any such book as these extracts were taken from, and if so, the book itself would not be evidence. It appears from the caption to the first table that whatever the book was, it was made up in 1885. It does not appear from what sources the statements made upon this book were derived. The transactions purport to have been in 1856, while this abstract was made in 1885, twenty-nine years later. It is, therefore, entitled to no credit whatever as evidence, and is legal evidence of nothing.

There was no evidence whatever that any entry was made upon the tract books in the land office showing that a pre-emption claim had been asserted or proved, or that any entry of the land had been made.

The only qualification of these statements is to be found in the certified copy of a letter of the Commissioner of the General Land Office of July 7, 1857, (Rec., 74.) This letter was directed to the register and receiver, at Sioux City, and notified them that pre-emption locations, among them—one numbered 53,493 of north-west quarter 27, 89, 47 of Thomas L. Griffey had been cancelled, for the reason that the lands claimed were not at the date of the respective settlements by pre-emption, *viz.*: 18th

and 19th of July, 1856, subject to pre-emption. This letter, however, does not contain any of the necessary documents that should have been produced for the purpose of showing that there was on the records of the government a statement of an entry and pre-emption claim as did appear in the Whitney case.

The argument of counsel before the Interior department to obtain the patents for Griffey appears in the record, but it is not evidence for any purpose except to show that an argument was made in support of the application. It is not evidence of the truth or existence of any facts set forth in the argument.

It is therefore insisted that there was nothing appearing *on record* which would prevent the passage of the title from the United States to the State of Iowa, and from the state to the railway company, as there was in the Whitney case; and therefore the facts in this case do not justify the application of any principle decided in that case.

2. The railroad was located July 5, 1856, so as to include the land in controversy in the grant made by the act of Congress of May 15, 1856, and the title then vested in the State of Iowa for the use of the railroad company, before any pretended pre-emption claim by Griffey.

For the purpose of the argument on this point it will be assumed that the grant by Congress did not attach to the particular quarter-section of land in controversy until the line was located, so as to determine the six mile limits on each side of the railroad.

The board of directors of the Dubuque and Pacific Railroad Company passed a resolution on the 26th day of May, 1856, authorizing the engineers of the road to

definitely locate the remainder of the line. In pursuance of that resolution the engineers did survey and locate the route. (Rec., 88, 118.)

A certificate was made September 23, 1856, by the president, engineer and secretary of the railroad company, attached to a map showing the location of the line and route from the city of Dubuque to a point on the Missouri river at Sioux City, with a branch to the mouth of the Tete de Morts, in compliance with the act of Congress, and in pursuance of a resolution of the board of directors, passed May 26, 1856, directing B. B. Provost, chief engineer of said road, to locate and definitely fix the route, and that so much of the field notes as is dated since said 26th day of May was done in pursuance of said resolution, and that so much of the field work as is dated on said map anterior to the said 26th day of May last was located at the time indicated by said dates, in pursuance of several resolutions of said board, directing said engineer to locate the same. (Rec., 118; Ex. 12 of Plff.'s Ev., on file with Record.)

This exhibit, No. 12 of plaintiff's evidence, shows the time at which the line of the road was located definitely, the different stations from Dubuque to Sioux City. The map shows that the line of road was located to Independence, Iowa, between July and November 6, 1855; from Independence west to a point near Webster City, between May 30th, and June 22, 1856; between Webster City and Ft. Dodge, between June 22d and 27th, 1856; from Ft. Dodge to a point on section 29, township 88, range 29, between June 27th and June 30, 1856. The map then shows the survey commenced at Sioux City on the 5th day of July, 1856, and to have been located between that point and the station in section 29, township 88,

range 29, between that date and the 5th of August, 1856. It appears, from the map as well as from the testimony, that the line from Sioux City eastward and by the tract of land in controversy was located by the engineer on the 5th day of July, 1856.

The road was actually constructed on the route so located, and there has never been any change therefrom.

The act of Congress of May 15, 1856, designates Sioux City as the western terminus of the railroad from Dubuque. The act of the Iowa Legislature of July 14, 1856, recognized the Dubuque and Sioux City Railroad Company as an existing corporation under the laws of Iowa. The company so organized located its line from Dubuque westward for a part of the route, and constructed a portion of it and put it in operation prior to the act of Congress of May 15, 1856.

Before the passage of the act of Congress on the 10th day of May, 1856, the commissioner of the General Land Office directed by wire the land officers at Sioux City to suspend from sale or location all lands south of the line dividing townships 91 and 92.

On the 15th day of May, the day the act was approved by the President, the commissioner of the General Land Office, by letter, confirmed the telegraphic dispatch of May 10th, and stated that the object of the withdrawal of the lands from sale or location was to protect from sale the lands granted to the State of Iowa for four railroads running from the Mississippi river to the Missouri river, by a bill which had just passed both houses of Congress. (Rec., 39, 40.)

By reference to a map of Iowa it will be seen that the line dividing townships 91 and 92 would run through

counties north of a tier of counties from the Mississippi river to the Missouri river from Dubuque to Sioux City, and that the whole of the line of railroad as located was south of that line. It will also appear that the whole of Woodbury county was south of that line. The other three roads mentioned in the act of Congress located south of the Dubuque and Sioux City Railroad and were substantially parallel therewith. It is clear, therefore, that the Commissioner of the General Land Office understood that no entries of land could be made or rights established thereto in the State of Iowa south of that line dividing townships 91 and 92 until the land grant should be adjusted. It appears that the Secretary of the Interior, by a letter of the 4th of February, 1857, asked the opinion of the Attorney General as to the construction of the land grant act. The Attorney General, by letter of the 16th of February, 1857, gave his opinion on the question submitted. (Rec., 77.) The question for consideration by the officers at that time was whether rights could be obtained to lands after the passage of the act and before the plat showing the location of the route was filed in the office of the Commissioner of the General land office. It was understood that the time when the act, took effect upon any particular tract of land was when the route was definitely fixed. It was then seen that the act did not provide any time or manner in which the route should be fixed, nor as to the evidence of the act in making the location. After some preliminary remarks the Attorney General proceeds as follows:

" Or the act not proceeding to this length can commit selection of routes to the railroad company, and then the company may itself locate by descriptive words or by plans of survey so precise that the land which it takes

from the proprietor, and the land which it leaves to him are thus capable of being distinguished with absolute certainty; or it may begin by marking out the route or earth with metes and bounds, and so fix to the eye that which it appropriates for the use of the road, and of which it therefore becomes possessed in right of legal ex-propriation.

"In the latter case is it necessary, in order to consummate the ex-propriation and new appropriation, that a plat should be drawn up and filed in some public place? I think not, unless that be expressly required by the statute as the condition of the charge of the property. If not so expressly required as condition of title, such filing of plat anywhere is but matter of notice.

"If the location of the road be on paper only, then the plat is a necessity of notice. But if the route has been actually marked on the earth, then the plat is but written authentication or evidence of that fact, and the filing of the plat is nothing but information or notice of what had been previously done.

"The subject of controversy, it is true, in the present inquiry is not the land on which the road is located, but land by the side of it dependent on the location. Still, the question what is definite location is one and the same as to secondary as well as primary consequences.

"Supposing the line of the road to be thus marked on the earth, it is fixed, then, at least in one of the ways in which such thing is capable of being fixed. So it would be if, instead of being marked on the earth, it were platted or otherwise located by official act on paper.

"But is it then definitely fixed? That is a point in the present case not so clear at first sight, for there is nothing in the acts to decide whether or not the state (or the

companies for it) can or not withdraw a plat filed and file a new one representing a change of location.

"I suppose the laws of the state may, perhaps, contain provisions on this point. If they do not, there might be doubt as to it under the general terms of the act of Congress. (*Hudson, etc., Canal Co.* v. *N. Y. & E. R. R.*, IX Paige's R., 322.)

"But we do not need to pause on this question, still less to take it up collaterally and in advance, for no danger of any wanton delay on the part of the state to make its locations definitive, exists in the present case; and until then the public lands on any one of the proposed routes are subject to sale by the United States, and every act of sale diminishes *pro tanto* the field of selection open to the state.

"There, indeed, is the very subject of dispute here. The state desires to hasten as much as possible the moment when the routes may be regarded as definitely fixed in order to save the lands from being taken up by private pre-emptors. I think we may deduce from this fact a rule applicable to the existing difficulty.

"The pre-emptor acquires inchoate or incipient title by entering on the land and then performing certain acts by means of which the land is visibly appropriated to his individual use, and thus segregated in fact from the public domains. If, in addition to these acts on the land, the pre-emptor afterwards performs certain acts of notice and proof in the local land office, then his previous equitable right is converted into a legal one, and the land selected by him comes to be segregated from the public domain in law. If, discontented with his first location, he makes another, of course he loses all rights under the first, whether as respects conflicting purchasers or as

respects the United States. Why should not the State of Iowa have similar rights in the present case? I cannot see why pre-emptors should have exclusive power to make title by acts *in pais*. It seems to me that the stakes and stones set, or other marks made by the state, are just as good notice to all the world as the stakes and stones set, or other marks made by pre-emptors. I know it is common to regard pre-emptors as a favored class, but their privileges must not be pushed to excess. Other people have rights as well as they. The competition here, as all the facts indicate, and as indeed your communication expressly declares, is between the state on the one hand and the 'speculative or fraudulent pre-emptors' on the other. I think quite enough is conceded to such pre-emptors, if they be suffered to enjoy equality of right with the state in that respect. Certainly there is no good reason why they should enjoy superior rights, and be allowed to commence title by sticking a stake into the earth, while the same advantage is denied to the state. If, on the premises of the assumption that no rights of the state attach until plats are prepared and filed, speculative pre-emptors may follow the agents of the state, step by step, and squat on the land, as the lines of road are surveyed and marked, and so anticipate all the railroad selections, the effect will be to defeat the beneficial purposes of the act of Congress.

"For all these reasons my conclusion is that by surveying and marking the lines on the ground those lines are definitely fixed, in so far as regards the present subject-matter—that is, to give to the state an equitable or inchoate title to the dependent lands, equal in right, at least, to that which any pre-emptor gains by commencing actual settlement; that the state may lose this inchoate

right by change of location, just as a pre-emptor will his by change of settlement; that the state perfects its inchoate title by filing the plats in the land office, as the pre-emptor does his by correspondent act; and thus equal justice will be administered to all parties—the state, the pre-emptor and the United States."

8 Opinions, Atty. Gen., 393–5.

This view and construction of the act was adopted by the Secretary of the Interior, and by the Commissioner of the General Land Office. The rule was then understood to be established that it was sufficient for the railroad company to mark the route on the surface of the ground, and that as soon as that act was done the title to the lands, within the prescribed limits, was vested in the grantee, and that it was not necessary to accomplish that result to fill a plat in the land office.

Following this rule the commissioner, on the 7th day of July, 1857, vacated and canceled the alleged entry and pre-emption of Griffey. The commissioner says: "It appears from the map of said route on file in this office that part of said road within the limits of which this land is situated, was located or definitely fixed on the 5th day of July, 1856, twelve or thirteen days prior to the respective dates of settlement by pre-emption." (Rec., 74.)

Griffey admits in his testimony that he obtained knowledge of this cancellation in the same month in which it was made. (Rec., 92.)

Griffey took no appeal from the decision of the commissioner to the secretary, as he might have done. He commenced no suit in a court to assert his claim to the land or to set aside the action which had been taken by the officers of the government.

The law was thus settled as far as it could be by the executive officers, and there was no decision of any court to the contrary. The officers of Iowa took the same view, for the agent appointed by the governor counted the lands in place and selected the indemnity lands before September 4, 1856, and on that day reported the list so selected to the commissioner, and this was before any map or plat was filed. (Rec., 41.)

In *Leavenworth, etc., R. R. Co.* v. *U. S.*, 92 U. S., 748, this court speaking by Mr. Justice DAVIS, referred to the rule as established at the time of these transactions. An act of Congress, granting lands, passed in 1863, was under consideration in that case. Mentioning the history of such matters, it is said in the opinion:

"Formerly lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those granted, and

within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it passed were not subject to it."

Was the decision made in 1856 and 1857, that the title vested in the State of Iowa for the use of the railroad company on the 5th day of July, 1856, when the line of the railroad was located on the surface of the ground, so as to show that the tract of land was within the specified limits, erroneous? If the question was such that a decision could have been reached that the title did not vest until the filing of plats on the 13th of October, 1856, as well as the opinion which was then formed, will the court at this day so decide it as to overrule the decision made thirty years ago and acquiesced in for more than twenty-five years?

It is most earnestly insisted that the construction given to the act of Congress by the executive officers of the government at that time was the correct one.

It is clear that the only object in fixing the location of the line with reference to the land granted was to determine the number of tracts which were within six miles on each side of the road which would pass under the grant.

The act did not say how the line should be located nor what evidence should be presented of such location. It may be, as a matter of convenience, that notice should be served in the proper office so as to prevent any adverse entries from being made. As the practice was, in advance of the act of Congress, or immediately following it, to withdraw from sale, pre-emption or homestead claims, all lands which might possibly be within the limits

of the grant, it was not necessary that any notice should be given to the land officers to prevent a disposition of the land. The only purpose to be accomplished by such notice would be to enable the government to dispose of the tracts not embraced within the grant. This result would, necessarily, be accomplished by the adjustment of the grant in any way that might be adopted by the land officers. This act does not require any map or plat to be filed. It does not require that the route or line should be located in any definite way; that was left to the ordinary modes of fixing a line and to the judgment of the railroad company and the officers of the United States. The usual and only way of establishing a route for a railroad is, after the termini are fixed, which is usually done in the act of incorporation, to pass resolutions adopting a route, or points on the route, or in the absence of such designation to authorize the engineers to make and survey the location of the line. When the survey is made, field notes are kept, and maps are made. The engineers report to the board of directors the result of their work. If authority is given to the engineers in advance, as was the case here, it requires no further action of the board of directors.

When this is done the line is located and in the language of this act it is "*definitely fixed.*" The filing of the plat or map, showing the route fixed by the engineers in the land office is not an act fixing the line, but it is merely evidence of the line previously fixed. There is no more of an obstacle in the way of changing the route after the map is filed in the land office than there is after it has been surveyed, field notes made of the route, and a plat showing the line. Even after the road shall actually be constructed it still may be changed by the board of

directors. It cannot truly be said that a line of a railroad is definitely fixed beyond change at any time. The act of Congress in using the words "*definitely fixed*" did not mean *irrevocably fixed.* It meant merely that the line should not be a preliminary one for the purpose of investigation and contemplating subsequent action before the location should be finally adopted by the board of directors, or established under their authority. In this case that was done by the resolution of May 26, 1856, and the resolutions prior to that time authorizing the chief engineer to survey, fix and locate the line, and the action of such engineer as he reported it to the board of directors. The evidence of such location was preserved in the maps and subsequently filed in the office of the general land commissioner.

This action of the railroad company was approved by the Commissioner of the General Land Office, the Secretary of the Interior and the Attorney General of the United States. Subsequently the grant was adjusted according to this rule. The land in controversy, with others, was certified as belonging to the railroad and passing under the grant. The state adopted the same view, and finally granted a patent to the railroad company. The act of Congress being silent as to how the line should be definitely fixed, it was left to the railroad company and to the land department to make it in such way as they deemed proper. This they did according to the rule of law then laid down, and in pursuance of it the title to the tract in question vested in the State of Iowa on the 5th day of July, 1856.

Several decisions of this court are relied upon to establish the proposition that the title could not pass from the United States and vest in the State of Iowa until the 13th

of October, 1856, when the map or plat showing the route was lodged in the general land office.

An examination, however, of these opinions will show that in the cases before the court there was an express provision requiring the filing of the map, to make the definite location of the line of route, or that it was made the duty of the government officer to withdraw the lands from market upon filing such a map.

It is sufficient to say that whatever the rule laid down by these cases, decided since 1865, even if they applied directly to the case now before the court ought not to be allowed to disturb the rules of law established, prior to that time, and according to which the title to the lands had passed from the United States. This would be more than retroactive legislation. It would be the establishment of rules by decisions of court, contrary to the rule of *stare decisis*, and having retroactive effect so as to divest title to land, and change the rules of property.

But it is not necessary to consider this principle in the present case. None of the cases relied upon by the defendants in error hold that under the act of May 15, 1856, it was necessary to file a map or plat in order to effect a transfer of the title from the United States. Mr. Joy in his argument on pages 18–23, has correctly stated the questions involved in those cases and drawn the distinction between them and the case at bar. It is not necessary for me to repeat what he has so well said.

In

Grinnell v. *R. R. Co.*, 103 U. S., 742,

the following language is used by Mr. Justice MILLER:

"The grant under the act of 1856 was, as has been often said, a grant *in presenti*, and though exactly what

this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done so that a surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained and the title relates back to the date of the grant.

"So far as lands are found in place when this is done, not coming within the exceptions as sold or held under pre-emption, the title, or at least the right, to this land in place is at once vested in the state or in the company to which the state has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer."

This language is used with reference to the act of May 15, 1856, granting lands to the State of Iowa. It seems, however, that there was a subsequent act of June 2, 1864, in which Congress authorized a change of the uncompleted part of the route, and such change was accordingly made. The act of 1864 expressly provided "that whenever such new line shall have been established, the said railroad company shall file in the General

Land Office at Washington a map definitely showing such new location." (13 U. S. Stat. at Large, 96.)

It also appeared in the statement of the case that on the 4th of September, 1858, a map had been filed in the land office showing the original route and the list had been certified to the State of Iowa, in December, 1858. It was held that in any event the title vested to the tract in controversy prior to the claim made by the pre-emption. The court did not hold that the act of 1856 required a map to be filed, but as it had been filed and the list certified from the land office to the state, it was held that nothing else remained which could be done to vest the title.

In *Leavenworth etc. R. R. Co.*, v. *U. S.*, 92 U. S., 749, the following language occurs in the opinion:

"We have before stated that the grant itself was *in presenti* and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them, however, did not depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was *marked out on the ground*, but as soon as this was done, it was easy to find them."

This question was decided by the Secretary of the Interior in the case of *Dakota Central R. R. Co.* v. *Downey*, January 22, 1889, Vol. 8 Decisions relating to the Public Lands, 115. In that case the controversy was in regard to twenty acres of land to be used for a station under the act of March 3, 1875. It was claimed by the railroad company that its right attached to the land at the time of the filing of the articles of incorporation and due

proof of organization July 9, 1879, and that the Downey entry September 20, 1882, was subject to that right.

The secretary held that by section 1 of the act, the title from the United States was vested in the railroad company when the articles of incorporation and proof of organization was filed with the Secretary of the Interior, and *the road was constructed* upon unsurveyed lands, and that it was not necessary, to effect that result, that a plat or map showing the location of the route should be filed with the secretary. He held that by section 4 of the act it was necessary to file a profile of the road as located upon a line of railroad not yet constructed, but which was contemplated. In effect, the decision was that the actual construction of the line on the surface of the earth was sufficient to complete the title to the land in the railroad company without the filing of a profile in the land department.

The act is to be found in 118 U. S. Stats. at Large, at page 482.

With reference to the construction of the first section, and the effect to be given it, the secretary uses the following language:

"As to the roadway the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. * * * This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with."

* * * * *

"But inasmuch as it is obvious that the railroad company has a perfect right to build upon unsurveyed lands, and that the construction of its road then fixes the exact

line from which the right of way is to be measured, in cases where a road has been constructed in fact, through unsurveyed land, its right is as perfect to the right of way defined by this statute, by measurement from its center line, as it is possible for it to be. The grant is complete, and defined in fact.

"It does not become necessary for a road, which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right of way.

* * * * *

"If a road has been constructed through unsurveyed lands, every person who makes entry upon any given subdivision surveyed after the construction of the railroad, does so with notice of the fact that the railroad owns a right of way to the extent of 100 feet in width on each side of the central line of said road. Any patent granted to a subdivision evolved by the survey, which should include a portion of this grant to the railroad company, must, therefore, be subject to that grant, because the grant is already perfect and complete. The cases in which notes are to be made on the entries of public lands are those of entries made before the construction of the road, for the purpose of excepting the grant to the railroad company, thus made upon the condition that the road shall be completed within five years, or the grant shall be forfeited.

"If it were to be held that a railroad company has a right to build its road on unsurveyed land, and yet, perhaps, years subsequent to the date of the completion and

operation of the road, and the actual appropriation of the land (under the first section) for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, within the limited quantity, that its right to the continued benefit of the ground for right of way, station-grounds, etc., must depend upon its filing a profile of its road after the township plats of survey are deposited in the land office, but before any other claimant can make a timber-culture entry, or a homestead entry, or file a pre-emption declaratory statement, or other step under the laws for the acquisition of public lands, it would be simply to deny to the company the benefit of the first section of the act. It would be impossible for the company to comply with the condition of filing a profile as quickly as individual settlers could file entries upon the land. A timber culture entry might be filed on a quarter section which would embrace the depot grounds of a company, including its buildings, side-tracks, etc., and it would be unreasonable, in my judgment, to suppose that Congress intended, in said act, that a railroad company, which had constructed its road prior to the initiation of any claim or right under the laws for the disposal of the public lands, should be compelled to purchase its improvements and right of way from the subsequent claimant."

The only reason for requiring the line of the road to be definitely fixed, as provided by the act of Congress of May 15, 1856, was to determine the particular tracts of land within the six miles strip on each side of the railroad. The act did not describe how, by what means, or in what manner the line should be definitely fixed. Whenever it was so fixed the object of Congress was accomplished. As soon as this line was determined in any proper way the belt of country was determined, and all of the odd num-

bered quarter sections of land within that territory immediately vested under the grant to the state. If the construction of the road was sufficient to definitely fix the line, a partial construction of the same would be equally sufficient. The action of the engineers in running the line on the face of the earth, marking it with stakes, preserving the evidence of that line, in field notes and on a map, which were reported to the board of directors, and which things had been done in pursuance of an absolute authority given to the engineers to make the location, was a very material part of the construction of the road. It fixed the beginning of such construction as definitely as it could be fixed by throwing up earth, or making excavations. If the Secretary of the Interior in the Dakota Central case was right in his construction of the act of 1875, which act was passed after the policy and practice had been changed in the land office with reference to the filing of plats was correct, clearly under the act of 1856, while a different policy and practice prevailed, it was sufficient for the same purpose.

This court has never decided that the line of a railroad, by the engineers of the company and the marking of it in the usual manner on the surface of the earth, was not sufficient under the act of 1856, or acts containing similar language, to determine the tracts of land embraced within the grant. It has been decided that where such work was done and a plat was made and filed in the land office, that the title did so vest. It was not necessary in any of the cases to decide whether the title vested prior to the filing of the map. In none of those cases did the adverse claim arise between the passage of the act and the filing of the map in the General Land Office. The question is now directly presented to the court upon a state of

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facts that calls for a decision for the first time. It is most earnestly insisted on the facts of this case that the state was vested with the title to the tract of land in controversy on the 5th day of July, 1856.

It may be contended that the Commissioner of the General Land Office, after his letters directing the local officers to reserve from sale or pre-emption claim all of the lands south of the line between townships 91 and 92, gave a contrary direction, by his letter to the same officers, of June 19, 1856. (Rec., 85.) The answer to such a proposition is that it is not the action of the commissioner in withdrawing, or not withdrawing, the lands, that has any effect on the question of the title. By the terms of the act the title was to vest *in presenti*, and because the route was indefinite it operated as a float until the route was located so as to identify the tracts of land embraced in the grant. Whenever the route was fixed so that the land could be identified, the title vested regardless of any action of the commissioner in withholding or offering the lands for sale or pre-emption. These letters of the commissioner are only material for the determination of the practice and rule of the department in such matters at that time. The position assumed by the letter of June 19th was abandoned as soon as the question was decided by the Attorney General, and the commissioner returned to his first construction of the act.

In *Buttz* v. *N. Pacific Railroad*, 119 U. S., 72, which was a case where the route was to be located, and a map thereof filed with the Secretary of the Interior, before the final location was made, the court say:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of

it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side.* The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

It was expressly decided in that case that the notification from the Interior Department did not add to the force of the act itself, and was not necessary to vest the title in the grantee.

3. *The title to the land in controversy passed from the United States to the State of Iowa, before the survey and location was made on the 5th of July, 1856, and immediately upon the approval of the act of Congress of May 15, 1856.*

According to all the decisions this act of Congress was a grant of title *in presenti*. The only thing remaining to be done after its passage was to identify the particular tracts of land embraced within its provisions. If the lands could be identified without any location of the route, then there was no postponement as to the investment of the title in the grant.

This principle is fully recognized and asserted in *St. Paul and Pacific* v. *N. Pacific*, 139 U. S., 2, 19. In that case, by different legislative acts and resolutions, a grant was made of indemnity lands, to make up for deficiencies found in a place limits. By a joint resolution of May 31, 1870, it was provided that when there was a deficiency within the limits prescribed the company should be entitled, under the directions of the Secretary of the Interior, to reserve so many sections of land belonging to the United States and designated by odd numbers in said state or territory within ten miles on each side of the route beyond the limits prescribed as would make up the lands that had been granted, sold, reserved, occupied by homestead settlers, pre-emptions, or otherwise disposed of, subsequent to the passage of the act of July 2, 1864.

It appeared that the Secretary of the Interior made no selection of the indemnity lands, and it was contended that until that was done the grant did not attach to the particular tracts of land in controversy. The court, however, asserted the rule which had been well established

that the grant was *in presenti* as to all of the lands within the terms of the grant and not reserved from it at the time of the location of the route.

As to the objection that the indemnity lands had not been identified by selection by the Secretary of the Interior, the court say: "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiency found in the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary in selecting from them, *for they were all appropriated.*"

If this principle is applied to the case now before the court, it will be seen that the tract of land in controversy was within the six miles on each side of the proposed road at the time the act of Congress was passed, and therefore that it was sufficiently identified to come within the terms of the grant before the survey was made and the route located. The name of the company was the Dubuque and Sioux City Railroad Company, thereby indicating the termini of the proposed route. It was incorporated and in existence in the year 1855. A cont siderable part of the route had not only been located, but constructed, running westward from Dubuque. The ac- of Congress of May 15, 1856, granted to the State of Iowa every alternate section of land designated by odd numbers, for six sections in width on each side of each of the roads therein mentioned, and one of the roads so mentioned was to be constructed from the city of Dubuque to a point on the Missouri river near Sioux City. It is therefore clear that the western terminus of the road was

Sioux City. The word "near" in the act of Congress was simply intended to give some latitude so that it should not be required to run into Sioux City. Sioux City at the time of the passage of the act of Congress was prospectively an important point, and it has since become one of the largest cities in the state. It was clearly the intention that this line of road should run across the state from the Mississippi river to the Missouri river and connect the cities of Dubuque and Sioux City. It was not possible to locate the line of road to the point designated in the act of Congress on the Missouri river without embracing within the strip of land twelve miles wide the tract of land in controversy in this suit. That being so, the title vested immediately upon the passage of the act, and it was not necessary that any subsequent act should be done by the railroad company or the government officers for the identification of this tract of land as coming within the terms of the grant.

4. *The defendants are estopped from questioning the title of the plaintiff and barred by their laches from recovering the land.*

Passing the questions prior to the time that the entry by Griffey was set aside, July 7, 1857, the facts are such as to preclude any successful assertion to the land by Griffey, or those claiming under him. The Commissioner of the General Land Office set aside this alleged entry, upon the ground that the land was not subject to pre-emption and entry, but had been previously granted to the State of Iowa by the act of May 15, 1856. From thence on down the officers of the United States recognized this title. No question was raised in regard to it until the application was made by Griffey for a patent,

which resulted in the issue of the patent in 1882. Meanwhile, it is true, that Griffey says he attempted to procure the passage of an act of Congress giving him relief, but his application was unsuccessful. What kind of relief he sought does not appear. Any such application, apparently, would be a recognition of the title of the railroad company.

The possession of the property has been in the plaintiff and its grantors, with very little interruption, from 1863, when the land was certified to the state which embraced this tract. Shortly before this suit was commenced an attempt was made to intrude upon the possession of the plaintiff by force. For about twenty-five years the title of the plaintiff seems to have been unassailed. Meanwhile the railroad was constructed. Sioux City had grown in population and business, and the value of the land had greatly increased. It seems that this old claim was looked up and asserted by the defendants, who are lawyers, and application made by them to the Land Office, which resulted in the issuing of the pateut. Whether or not the act of Congress of 1876 was procured with reference to this claim, it certainly was obtained with reference to other similar claims. There is no merit or justice on the part of the defendants. There is nothing to invoke the aid of a court of equity.

It may be that this question cannot be raised on the writ of error from the Supreme court of the state, but it seems to be a proper method of preventing the defendants from recovering the land under the points which are federal questions, and properly reviewable in this court. It is insisted that the entire decree of the court below is erroneous ; that the plaintiff is the owner of a good title

in fee, and the defendants have no title to the property in question. If so, this court ought to reverse the decree and judgment, with directions to the Supreme court of Iowa to enter the proper order for reversal and remanding the case to the District court of Iowa, to enter a decree in favor of the plaintiff.

WILLIAM C. GOUDY,
For Plaintiffs in Error.

Supreme Court U. S.
FILED,
JAN 6 1892

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 157.

THE SIOUX CITY & IOWA FALLS TOWN LOT AND LAND COMPANY,

PLAINTIFF IN ERROR,

vs.

THOMAS L. GRIFFEY, CHARLES CHAMBERLAIN, O. C. TREADWAY, AND OTHERS.

In Error to the Supreme Court of Iowa.

BRIEF FOR DEFENDANTS IN ERROR.

O. C. TREADWAY AND
S. S. BURDETT,
Attorneys for Defendants in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

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No. 157.

In Error to the Supreme Court of the State of Iowa.

Brief for the Defendants in Error.

STATEMENT OF THE CASE.

This was a proceeding in equity brought by the plaintiff below, who is the plaintiff in error here, in the district court for Woodbury county, Iowa. It was begun by the filing of a petition in equity in that court on the 23d day of June, 1883.

The cause was submitted to the said district court at its March term, 1886, and at the same term there was judgment and decree for the defendants. There was an appeal to the

supreme court of the State of Iowa, and the cause was submitted to that court at its October term, 1887. The judgment and decree of the district court were in all things confirmed. The said plaintiff thereupon brought the cause by writ of error to this Court. The controversy involved the title to the NW. ¼ of sec. 27, township 89 north, of range 47, situated in Woodbury county, Iowa. The land lies within the primary or six miles limit of the grant of lands made to the State of Iowa by the act of Congress approved May 15, 1856 (11 Stat. 9), to aid in the construction of certain railroads in that State, as the same were definitely located and constructed.

The plaintiff's claim of title rests upon the said act of May 15, 1856; the certification thereunder of the said tract with other lands to the State of Iowa by the Land Department on the 7th day of April, 1863, and on certain alleged grants and assignments by the said State and its grantees to the said plaintiff.

The defendants below, who are the defendants in error here, rest their claim of title upon the settlement and entry of the said tract under the pre-emption laws of the U. S. (act of 1841) by Thomas L. Griffey, one of the said defendants, and on certain conveyances from him.

The Plaintiff's Case.

The particular facts set out and relied upon in the plaintiff's petition in equity, so far as they relate to the sole issue reviewable in this Court, are—

That Congress, by the said act, approved May 15, 1856, granted certain lands (embracing the tract in dispute) to the State of Iowa to aid in the construction of a railroad from the city of Dubuque, Iowa, to a point on the Missouri river in said State. (Record, p. 1.)

That the general assembly of Iowa, by act approved July 14, 1856, accepted the grant and conferred the same on the Dubuque and Pacific Railroad Company upon the conditions contained in said act. (Record, p. 2.)

That the said company, after the passage of the said act of Congress, made a survey and location of the line of road and caused a map thereof to be made and filed, as required by the act of Congress, and that the said line was so surveyed and staked out upon the surface of the earth through the county of Woodbury and past the land in controversy on the 5th day of July, 1856. (Record, p. 2.)

That on the 7th day of April, 1863, the Secretary of the Interior approved and certified the tract of land in suit to the State of Iowa under the said act of May 15, 1856, for the use of the railroad company constructing the said road. (Record, p. 3.)

That by certain acts and proceedings of the legislature of Iowa and of the parties, the grant which had been conferred on the Dubuque and Pacific Railroad Company was transferred to, and became the property of, the Iowa Falls and Sioux City Railroad Company, by which company the said line of railroad was completed. (Record, pp. 3 and 4.)

That on the 5th day of July, 1871, the State of Iowa patented the said land to the said last named company, and thereafter the said company conveyed the same to one Vail; that Vail conveyed it to John I. Blair, who on July 7, 1871, conveyed the same to the plaintiff in error, the Sioux City and Iowa Falls Town Lot and Land Company. (Record, p. 5.)

The petition further asserted title in the plaintiff under the statute of limitations of the State of Iowa, by reason of alleged open, adverse, and notorious possession of said premises for more than ten years prior to the bringing of the suit.

The Defendant's Case.

The answer and counter-claim of the defendant below, the defendant in error here—

Admits the passage of the act approved May 15, 1856, and that the land in dispute is within the six-mile limit of the grant made by said act to the State of Iowa, and of the grant made by the State to the Dubuque and Pacific Railroad Company, but avers that at and before the time the line of said road was definitely fixed the said land had been and was appropriated by the defendant, Thomas L. Griffey, under the pre-emption law, and was under the express terms of the grants for that reason excepted and excluded from the grant to said State.

Admits that the said Dubuque and Pacific Railroad Company after the passage of the aforesaid act of Congress made a survey and location of its line of road, and caused a map thereof to be filed in the Land Department, but denies that said line of road was surveyed and located past the land in dispute on July 5, 1856, but avers that any pretended survey in the field made at, or prior to, that date, was without authority, force, or effect whatever, because made before the acceptance of the grant by the State of Iowa, and before the said grant had been conferred on any railroad company or corporation whatever. (Record, pp. 12 and 13.)

The answer further avers that the act of the General Assembly of Iowa accepting the grant and conferring the same on the Dubuque and Pacific Railroad Company was not passed until July 14, 1856. That the said act of Assembly required the said railroad company to accept the provisions of said act by written instrument within ninety days from the passage thereof; required that the line of the route of the said road be definitely fixed on or before the 1st day of April next after the passage of said act, and

that maps or plats showing such line of definite location be filed in the office of the Governor and Secretary of State of Iowa, and further required the Governor of said State to affix his official signature to and to file such maps in the Department having the charge of public lands at Washington, and that none of these requirements were complied with until long after the pre-emption rights of the defendant Griffey had attached to the tract in controversy. (Record, pp. 13 and 14.)

The answer admits that the land in controversy was included in a list of lands certified to the State of Iowa on April 7, 1863, as enuring to the State for the benefit of said company under the said act of May 15, 1856; but avers that said certification was wrongful and unlawful, and is null and void because the equitable title thereto had long before passed to said defendant Griffey, under his aforesaid settlement and entry. (Record, p. 15.)

To the plaintiff's allegation that the State of Iowa, on July 5, 1871, patented said land to said railroad company, the answer replies, that such patent if made was issued through error and mistake of law and fact, and was and is unlawful, null and void, and in derogation of the prior and paramount right of said defendant Griffey to said land, and that the subsequent conveyances by said company were likewise unlawful, null and void. (Record, p. 17.)

And as to the said certification of the tract in dispute to the State of Iowa by the list approved April 7, 1863, the answer avers that if the legal title to said land passed to the State by virtue thereof, that the said State held the same in trust for said Griffey, to whom it justly and equitably belonged, and not in trust for the Iowa Falls and Sioux City Railroad Company, and that the said certification and all rights claimed under it have been and were by the patent of the United States issued to said Griffey upon his pre-emp-

tion entry, and dated June 30, 1882, annulled and made of no effect. (Record, p. 18.)

By way of further answer and counter-claim it is averred—

That the defendant, Thomas L. Griffey, filed his declaratory statement for the land in question under the pre-emption law of the United States on July 19, 1856, having previously settled thereon; that he made his final proof and payment September 6, 1856, and that the usual final certificate of entry was duly issued to him, whereby he became entitled to the patent of the United States; that no patent was, however, then issued to him, but that through the error of the Commissioner of the General Land Office the entry of said Griffey was held for cancellation, and the tract certified to the State of Iowa. (Record, p. 19.)

That upon the passage of the act of April 21, 1876, entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department," said Griffey applied to the Commissioner of the General Land Office for the reinstatement of his said entry and for the issuance of a patent; that his said application was allowed by the Commissioner, and upon appeal to the Secretary of the Interior by the grantors of the plaintiffs in this proceeding the judgment of the Commissioner was affirmed, and thereupon, to wit, June 30, 1882, the patent of the United States duly issued to him. (Record, p. 20.)

The answer also alleges that defendant Griffey and those claiming under him have had and held the actual, open, and notorious possession of said land from the date of his settlement thereon under the pre-emption laws of the United States from July 19, 1856, down to the time of bringing suit, and that the said action set forth in plaintiffs' bill is barred by the statute of limitations, for that more than ten

years have intervened between the accruing of plaintiffs' pretended cause of action and the bringing of this suit. (Record, p. 22.)

The reply of the plaintiff denies that by virtue of said act of Congress of April 21, 1876, the right and title of Thomas L. Griffey and those claiming under him was ratified, but averred that the issuing to him of patent thereunder was unauthorized and illegal, and the patent so issued void.

Denies that Griffey acquired any rights in said land by virtue of his settlement thereon as a pre-emptor, or that he perfected his right thereunder as such pre-emptor, but avers that at the time of the pretended settlement thereon, July 19, 1856, the said land was not subject to pre-emption because the line of the railroad to aid in the construction of which the said land had been granted had been definitely located past the land in suit.

Avers that Griffey's pre-emption entry was never approved by the General Land Office, but on July 5, 1857, was cancelled by the Commissioner on the ground that the rights of the railroad company had attached to the tract prior to Griffey's settlement. (Record, p. 25.)

There was a further averment in the reply—on information and belief—that the pre-emption of Griffey was not made in good faith, but for speculative purposes; that he never cultivated or improved the land, and that his residence was colorable only. (Record, pp. 25, 26.)

The prayer of the petition was that the plaintiff be decreed to be the owner of and entitled to the possession of the land; that the title thereto be established and quieted in petitioner; that the patent issued to Griffey be decreed to be void and of no effect, and that the defendant be adjudged to have no right, title, or interest in the premises. (Record, p. 7.)

The prayer of the answer and counter-claim was that the plaintiff's action be dismissed, that the certification of the land to the State of April 7, 1863, by the United States, alleged to have been made under the act of Congress of May 15, 1856, be set aside and cancelled, or that it be decreed that the land in suit be held by said State in trust for defendant Griffey and those claiming under him; that the patent from the State for said land to the Iowa Falls and Sioux City Railroad Company, of date July 5, 1871, be declared null and void; that other deeds from said Company and its successors to the plaintiff each and all be set aside and declared of no effect; that defendant's title, claim, and interest in and to said land be allowed, confirmed, and established by the decree of the court, free and clear of any claim, lien, or interest of plaintiff. (Record, pp. 23 and 24.)

The judgment and decree of the district court of Iowa for said Woodbury county was: That plaintiff was not entitled to the relief demanded, and that defendants are entitled to the relief demanded in their cross-bill and counter-claim; that the plaintiff's bill be dismissed; that the defendants are the absolute owners in fee of the premises in controversy in the proportions stated and found, and that the title of defendants to said land in their respective interests be granted and confirmed against the adverse claims of all parties claiming by, through, or under the plaintiff, and that plaintiff be barred of all interest therein, and their pretended title adjudged null and void. (Record, p. 113.)

The judgment of the supreme court of Iowa was that the judgment of the court below be affirmed, and that a writ of *procedendo* issue accordingly. (Record, p. 143.)

The opinion of the supreme court of Iowa dealt with and decided two questions only:

1st. (In the language of the opinion), "whether under the railroad grant the right of the plaintiff's grantor at-

tached to the land prior to the 19th day of July, 1856, and this depends on the further question whether the survey of the line of the road made on July 5, 1856, and staking out such line, can be regarded as the definite location of such line as required by the act of Congress, or whether such location should not be regarded as made until the plat of the survey was filed in the General Land Office in October, 1856. (Record, p. 141.)

2d. Whether the right to the affirmative relief prayed for by the defendant was barred by the State statute of of limitations. (Record, pp. 142–143.) 72 Iowa, 505.

The second of the issues presents no Federal question and is not here for review.

The assignments attached to the writ which brings the cause to this Court allege error in the proceedings of the supreme court of Iowa.

(*a*) In so construing the act of Congress making the grant to Iowa as to hold that the railroad company's rights through which plaintiff claims did not attach to said land until the map of definite location of the line of road was filed in the office of the Secretary of the Interior. (Assignment 2.)

(*b*) That the court erred in so construing the pre-emption law of 1841, under which defendent Griffey acquired title, as to hold that his pretended settlement and improvements upon said land gave him any right thereunder (assignment 3), and in holding that the acts of Griffey under the pre-emption law were a compliance with said law. (Assignment 4.)

(*c*) Error in holding that the patent issued to Thomas L. Griffey by the United States under authority of the act

of Congress of April 21, 1876, was of any validity. (Assignment 5, Record, p. 148.)

The one matter, and we think the only one which is properly here for determination as presenting a question under a law of the United States, is that formulated in the second assignment, and which controverts the opinion of the supreme court of Iowa in holding that the filing of the map of the line of the road in the Land Department, and not the survey in the field as it progresses from day to day, is the definite location or definite fixing of the line or route of the road upon which title vested in the State.

The facts necessay to determine this very narrow issue, grouped together, are:

1st. That Thomas L. Griffey settled upon and filed his pre-emption declaratory statement July 19, 1856. (Record, p. 82.) That he made proof and payment before the proper local land office and received his final certificate of entry September 5, 1856. (Record, pp. 82–3.)

2d. That by the act approved May 15, 1856, Congress granted to the State of Iowa for the purpose of aiding in the construction of certain railroads, and among them one from the city of Dubuque to a point on the Missouri river near Sioux City, Iowa, "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alter-

nate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid." (11 Stat. p. 9.)

That on the 5th day of July, 1856, the Dubuque and Pacific Railroad Company, a private corporation existing under the laws of the State of Iowa, having then no interest in the grant made by the said act of May 15, 1856, and no privity with the State of Iowa in any matter respecting the said grant of lands to said State, or respecting the building, ownership, or control of the said line of railroad contemplated by said act of Congress, began the survey of a line for a railroad, which, starting at a point at Sioux City, Iowa, ran past and near the tract of land in question. (Record, p. 70.)

That on the 14th day of July, 1856, the General Assembly of Iowa passed an act (which took effect August 5, 1856, see Thatcher *v.* Haun, 12 Iowa, 303), accepting the grant and grants made by the said act of Congress approved May 15, 1856, and conferred the same, on the conditions and stipulations therein specified, on the said Dubuque and Pacific Railroad Company. (Record, p. 28.)

That the said Company accepted the said grant, but at what date such acceptance was notified to the State does not appear (Record, p. 116), and on the 2d day of October, 1856, filed with the Governor of said State its proposed map of definite location of the said line of road. (Record, p. 81.)

That on the said 2d day of October, 1856, the Governor of the State of Iowa, in conformity with the requirements of the said act of Assembly, approved the said map, and thereafter, to wit, on the 13th day of October, 1856, filed the same in the office of the Secretary of the Interior, at Washington, D. C. (Record, pp. 54 and 81.)

So much of the said act of the General Assembly of Iowa approved July 14, 1856, as relates to the grant of lands for

the line of road here in controversy, is found in sections 1, 5, and 6 of said act of Assembly, and appears at pages 28 and 29 of the Record in this case.

BRIEF OF THE ARGUMENT.

I.

The title of the beneficiary under a grant of public lands to aid in the construction of railroads attaches to specific tracts falling within the primary limits of the grant upon the definite location of the line of the road authorized by the law of the grant.

Leavenworth, etc., R.R. Co. *v.* U. S., 92 U. S. 733.
Grinnel *v.* Railroad Co., 103 U. S. 739.
Van Wyck *v.* Knevals, 106 *Id.* 360.

The act of grant here under review, in common with all the acts of Congress of like character, specifically reserved to the United States, up to the date and fact of definite location, the right to sell, and to qualified persons, citizens of the United States, the right to freely take under the pre-emption law any tracts which on definite location would fall within the limits and the conveyance intended by the grant.

Act approved May 15, 1856, sec. 1, 11 Stats. 9.

The controversies which have been considered and decided in this Court have been concerned with the question of what it is that constitutes definite location, so as to fix the point of time when the United States and proposing pre-emptors are estopped from further sale or appropriation. That is the question presented by the second assignment of error in this case; the particular objection made being to the holding by the Iowa court "that the railroad company's

rights through which plaintiff claims did not attach to said land until the map of definite location of the line of road was filed in the office of the Secretary of the Interior. (Record, p. 148.)

The counter-proposition of the plaintiff in error being that the line or route of this railroad became definitely fixed, so as to pass over to the State the tract in controversy and all of the public lands in the odd sections found to be within six miles on either side thereof, by a survey made in the field on the 5th day of July, 1856; that such survey, and the marking of its course and place on the ground, as it progressed from day to day, satisfied the definite location which the law required, and that each day's work for the distance made operated to withdraw the sections through or along which it passed from the right of further disposal by the United States, or further appropriation by pre-emptors. This precise question has been often decided in this Court, and held against the contention of plaintiff in error.

The determination of this Court is that "the route must be considered as 'defininitely fixed' when it has ceased to be the subject of change at the volition of the company," and upon the point of time, or upon the doing of what act this condition happens, the court has said: "Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantage of different lines. But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior, and accepted by that officer, the route is established. It is, in the language of the act, "definitely fixed, and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

Van Wyck *v.* Knevals, *supra.*

The act construed in that case was that of July 23, 1866 (14 Stats. 210). The provisions of its first section as to conditions and definite location are in every essential particular the same as those of the first section of the act of May 15, 1856.

The only provision of the first-named act on which a difference of requirement can be predicated is that by its fourth section it was made the duty of the Secretary of the Interior, whenever the said company should file with him maps of its lines designating the route thereof, "to withdraw from market the land granted by this act, in such manner as may be best calculated to effect the purposes of the act and subserve the public interest."

We need not point it out that the principle on which the court proceeded to the formulation of its rule above quoted in nowise depended upon the provisions of the said fourth section; that the section itself does not purport to declare the method of evidencing ~~out~~ the definite fixing of the line, but contained the condition on which it should become the duty of the Secretary of the Interior to withdraw from market the land granted by the act, a matter which, whether done or not, the court points it out, in nowise affects the rights of the company flowing out of the definite fixing of the line.

The principle first announced with precision in Van Wyck *v.* Knevals, *supra*, has been followed in

Cedar Rapids, etc., Co. *v.* Herring, 110 U. S. 38.
Kansas Pac. R. Co. *v.* Dunmeyer, 113 *Id.* 635.
Walden *v.* Knevals, 114 *Id.* 373.
Barney *et al. v.* Winona & St. P. R.R., 117 *Id.* 228.
Buttz *v.* Northern Pacific R. Co., 119 *Id.* 55.
St. Paul Railway Co. *v.* Phelps, 137 *Id.* 528.

The rule for evidencing the fact of definite location contended for by plaintiff in error is the opposite in extreme of that laid down by this Court, and is a most apt illustration of the wisdom and justice of the rule determined by the Court.

The day's work of the surveying party done on the 5th day of July, 1856, and which, as is alleged, passed the tract in controversy on that day, was mere field work. It was some time before it received—if it ever did—the approval of the company's chief engineer, or was approved and adopted by the company. We say, if it ever did, because there is some proof in the Record (testimony of T. J. Stone, Record, p. 118) that the line as constructed varied from that survey in some places as much as four or five miles. The rule of the Court is founded on the proposition that so considerable a fact as the passing of title out of the United States to a large body of the public land must be by a proceeding certain in form and final in effect as between the parties, and the test is that the thing shall be so done as to be thenceforward no longer the subject of change "at the volition of the company."

The rule contended for by the plaintiff in error is that the manual performance in the field by the sub-agents of the construction company satisfies the requirement of the statute. We note again in passing that the meagerness of performance on which the plaintiff in error rests its claim of title to this particular tract is emphasized by the fact before noted, that the survey of July 5, 1856, was under authority of a company which, until some time thereafter, had no connection with the line of road endowed with this grant save in expectancy. And it is proper to note that the State in its act of acceptance prescribed the form of evidencing the definite location of the line of road to be built upon the principles this Court declares to be the true ones, viz., by the filing of a map thereof with the Land Department.

The Iowa act required that before a day specified, viz., before the first day of April, 1857, the constructing company should file in the office of the Governor of the State of Iowa, and also in the office of the Secretary of State of Iowa, a map of the line of road as finally located; and it was made the duty of the Governor, after affixing his official signature thereto, to file such map in the Department having the control of the public lands in Washington. (Act of Assembly of Iowa approved July 14, 1856, Sec. 6, Record, p. 29.)

The right of a State, the beneficiary of a grant from Congress to aid in the construction of a railroad, to impose upon its grantee terms and conditions affecting or limiting the property rights transferred, though found to be in excess of the limitations imposed on the State by the United States, was before this Court in Baker *v.* Gee (1 Wall. 333), and was sustained; this Court holding that a provision added by the legislature of Missouri, that definite location should not be effective to cut off settlement rights under the pre-emption law until a map of the line of route was caused to be recorded by the company in the county where the land was situated, was valid and binding as between the State and its grantee.

II.

The third and fourth assignments of error call in question the rights and the sufficiency of the performance of conditions by Griffey under the pre-emption law.

There has been no attempt to show that Griffey did not possess all the personal qualifications entitling him to the exercise of the pre-emption privilege. These assignments, therefore, mean one or all of three things, viz:

1st. That the land in dispute was not subject to pre-emp-

tion at date of Griffey's settlement (July 19, 1856), because of the grant contained in the act of May 15, 1856; or,

2d. Because his settlement, improvement, and inhabitancy was insufficient to entitle him to make entry of the tract; or,

3d. Because his settlement was speculative, as falling within some of the prohibitions of section 2262 of the Revised Statutes.

If the first of the three above-stated matters be meant, it is but a restatement of the second assignment of errors, which has already had consideration.

If the second and third or either of them be meant, it is to be said that there is nothing in the record before this Court indicating that the judgment of the Land Department affirming the sufficiency and integrity of Griffey's pre-emption proof was attacked below for any of the causes which in this Court are held to be permissible in a proper case. Nor is it to be gathered from the record that any serious assault was made below on the validity of the pre-emption entry, save only on the ground of the priority of the rights of the company to the tract, growing out of the alleged field survey of July 5, 1856. The counter-claim of the defendants below asserted that the equitable title vested in Griffey under his pre-emption settlement, entry, and payment, completed in the local land office on the 5th day of September, 1856, and before the filing of the company's map of definite location in the Land Department, which was on the 13th day of October, 1856, and that the full legal title vested by the issuance to him on the 30th day of June, 1882, of the patent of the United States for the land so entered.

The ultimate validity of Griffey's entry is not the test upon which the rights of the company to the tract are to be affirmed or denied; for if, when the lines or route of the road was "definitely fixed," there was a subsisting pre-

emption entry, upon the land, regular in form, "the right of pre-emption," in the sense of the exception found in sec. 1 of the act of May 15, 1856, had attached, and the tract would not have enured to the grant, though, on further examination in the Land Department, the entry had been cancelled for some lawful cause growing out of the fraud, fault, or failure of the pre-emptor.

In *Kansas Pacific Ry. Co.* v. *Dunmeyer* (113 U. S. 629), the court at page 641 said:

"The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, &c., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations.

"The reasonable purpose of the Government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted."

This doctrine was affirmed in—

Hastings & Dakota R.R. Co. *v.* Whitney, 132 U. S. 357.

It is based on the early deliverances of this Court, holding that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained."

Wilcox *v.* Jackson, 13 Pet. 498.

Carroll *v.* Safford, 3 How. 441.

Witherspoon *v.* Duncan, 4 Wall. 210.

The Land Department has for many years administered the law of grants in aid of the construction of railways on this principle, but has gone much further, holding that the existence of a *prima facie* valid pre-emption filing at the time when the grant becomes effective excepts the land covered thereby, and the failure of the pre-emptor to comply with the law does not defeat the exception.

St. Paul, M. & M. Ry. Co. *v.* Northern Pac. R.R. Co., 12 Land. Dec. 567.

Oregon and California R.R. Co. *v.* Barrett, 12 *Id.* 232.

Southern Pacific R.R. Co. *v.* James, 12 *Id.* 479.

It follows that the actual cancellation of the Griffey entry by the Commissioner on the 7th day of July, 1857, for whatever cause, neither gave new rights nor revived any former claim of right to the tract in the company.

The cause of the cancellation stated in the letter of the Commissioner ordering it was, that the tract, and another tract referred to, at the date of settlement, July 19, 1856, was not subject to pre-emption, because found to be within the six-mile limit of the Dubuque and Pacific Railroad. It appearing, says the Commissioner, "from the map of said

road as filed in this Office, that part of said road within the limits of which this land is situated was located or definitely fixed on the 5th day of July, 1856, twelve and thirteen days prior to the respective dates of settlement by pre-emption" (Record, p. 74). There was, therefore, no calling in question of the validity of Griffey's pre-emption on any ground or cause of failure on the part of the pre-emptor. The relief provided by the act of April 21, 1876, enabled Griffey to demand consideration of his entry by the Land Department in the light of the proof on which his entry had been awarded. He accordingly, in 1878, instituted the proceedings in the General Land Office for the confirmation of his pre-emption entry, which resulted in the issuance of a patent to him. The plaintiff in error, by his grantors, intervened in that proceeding and carried the case to the Secretary on appeal from the Commissioner's decision in Griffey's favor. The company did the thing which this Court in Kansas Pacific Ry. Co. *v.* Dunmeyer, *supra*, described in the words of Mr. Justice Miller: "It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation." (Record, p. 104.)

The first section of said act of April 21, 1876, is as follows:

"That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made

by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

It will be seen that the act only awarded the relief intended upon the finding of good faith in the settler, and that the pre-emption or homestead laws had been complied with and proper proof thereof made.

It is settled doctrine that the decisions of the officers of the Land Department, made within the scope of their authority, upon the facts which are the foundation of their action, when unaffected by fraud or mistake, are conclusive in the courts.

Johnson *v.* Towsley, 13 Wall. 72.
Shepley *et al. v.* Cowan *et al.*, 91 U. S. 340.
Moore *v.* Robbins, 96 *Id.* 530.
Heath *v.* Wallace, 138 *Id.* 573.

There was no showing below of fraud on the part of Griffey, or of fraud or mistake in any matter of fact on the part of the officers of the Government in their proceedings in awarding entry on Griffey's final proof. Nor was there room for holding that Griffey had lost any of his rights by acquiescence in the mistaken action of the Commissioner in cancelling his entry. He had refused to receive back his purchase money, and had kept up a clamor for relief in the Department and before Congress until patent was issued to him. (Record, pp. 119–131.)

The matter of the sufficiency of Griffey's performances as a pre-emptor was one solely between himself and the United States. The plaintiff in error cannot be heard on that question. No individual can assail a title conveyed by the Government on the ground that the grantee has failed to perform the conditions annexed. "The United States

are not complaining and no other party has a right to complain."

Baker *v.* Gee, *supra.*

Bybee *v.* Oregon, &c., R.R. Co., 139 U. S. 663.

III.

The fifth assignment of error assumes that the supreme court of Iowa based something of its judgment on a finding that the Commissioner and Secretary rightly adjudged Griffey entitled to relief under the act of April 21, 1876. The intendment of the assignment is, that the court below ought to have found that the case of Griffey was not within the mischief which that act was passed to remedy, and that the patent issued to him thereunder was of no validity. We remark upon this, that though the supreme court of Iowa in its opinion recited the fact of the proceedings in the Land Department under the act aforesaid, it does not appear that those proceedings and the issuance of the patent thereunder affected its judgment. That Court perceived, what must be abundantly clear to this Court, that the sole question as determining whether or not the plaintiff in error had any title in the land flowing from the United States depended on the true determination of what constituted and the date of the definite location of its line of road. To that point its opinion and judgment was addressed, and having found that Griffey's settlement and entry both antedated the company's definite location, the means by which the equitable title vested in Griffey by his payment and entry became perfected into a legal estate, was not a subject demanding consideration at its hands for any purpose of the title which the plaintiff asserted to have been vested in itself by compliance with the act of May 15, 1856.

Irrespective of the relief found for Griffey in the said act of April 21, 1876, and without appealing to its provisions at all, the defendants set up in their counter-claim and made by their proofs a case under which the decree must have been in their favor.

At the conclusion of the 17th paragraph of their answer and counter-claim, the defendants aver "that if the legal title to said land passed to said State by virtue of said certificate of April 7, 1863, the said State held the same in trust for said Griffey, to whom it justly and equitably belonged, and not in trust for the Dubuque and Pacific Railroad Company, to whom it never belonged. (Record, p. 18.)

And their alternative prayer for relief was that the said certification of said land by the United States to the State on April 7, 1863, be set aside and cancelled, or that it be decreed that the land in suit be held by said State in trust for defendant Griffey and those claiming under him.

This state of the pleadings, if the certification of April 7, 1863, was of such validity as to give color of title, presented a case within the rule "that after title has passed from the Government to individuals and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

Johnson *v.* Towsley, *supra.*

Notwithstanding an order cancelling an entry made in accordance with law, accompanied by payment of the purchase money, the entryman and those claiming under him can stand upon it, and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner.

Cornelius *v.* Kessel, 128 U. S. 457.

But the said certification was invalid in the sense that it was utterly null and void. It gave no aid to the claimed

title of the company. The title, if at all, passed by the grant; the definite fixing of the line identified the lands conveyed. Acts of Congress of the character of that of May 15, 1856, are *conveyances* as well as laws.

Mo., etc., Ry. Co. *v.* Kan. Pac. Ry. Co., 97 U. S. 497.

Formal certification or patenting of tracts within the primary limits of a grant for railroad purposes is serviceable as a convenient manner of proof, and where, as in such cases, it issues on the confirmation of a previously existing title, it is but matter of further assurance of title.

Langdean *v.* Hanes, 21 Wall. 521.
Morrow *v.* Whitney, 95 U. S. 551.
Whitney *v.* Morrow, 112 *Id.* 695.

But "no title can be held valid which has been acquired against law." "The issuing of a patent is a ministerial act, which must be performed according to law." "It would be a most dangerous principle to hold that a patent should carry the legal title though obtained fraudulently or against law."

Patents by the United States for land which it has previously granted, reserved from sale, or appropriated, are void.

Stoddard *v.* Chambers, 2 How. 284.
Reichart *v.* Felps, 6 Wall. 160.
Johnson *v.* Towsley, 13 *Id.* 72.
Simmons *v.* Wagner, 101 U. S. 260.

The validity of such a patent may be contested at law.

Patterson *v.* Winn. 11 Wheat. 380.
Smelting Co. *v.* Kemp, 104 U. S. 636.

An entry of land under the pre-emption law is a segre-

gation of the tract entered from the body of the public domain.

Yosemite Valley Case, 15 Wall. 77.

When a Government officer, acting under authority of law and in accordance with its forms, conveys to an individual a tract of land as land of the Government, the deed will pass only such title as the Government has therein; and there is no presumption of law that it is a valid title.

Sabariego *v.* Maverick, 124 U. S. 261.

IV.

The summary of the case as it is brought here is that—

The plaintiff in error claiming title to the tract of land in question stands upon a deraignment of title from the United States through the State of Iowa and through certain railway companies claiming under the State, to whom, it is asserted, had been transferred in succession any title which vested in the State by the act of May 15, 1856.

The facts relied upon to sustain the claim of title asserted are:

1st. That the tract is within the primary limits of the grant made to Iowa by the said act, as those limits were finally determined by the definite location and by the construction of the line of the railroad in aid of which the grant was made.

2d. That the route was so definitely fixed on the 5th day of July, 1856, by the act of a corps of surveyors in the employ of a railroad company (the Dubuque and Pacific), upon whom the grant contained in the act of May 15, 1856, was afterwards conferred in running and staking out a proposed line of road in the immediate vicinity of the tracts.

The defendant in error concedes that the tract is geo-

graphically within the said primary limits; that on the fifth day of July, 1856, it was public land of the United States, and that it then passed under the grant to the State of Iowa, if on that day the line of the road became "definitely fixed" in the sense of the granting act.

But the defendant in error insists that the said line of road did not become definitely fixed until the map of the surveyed line of route was filed in the office of the Secretary of the Interior at Washington, which act was performed on the 13th day of October, 1856, and that at that day the tract was not of the public lands of the United States, but had become segregated therefrom and was the private property of Thomas L. Griffey, because of his preemption settlement and filing of July 19, 1856, and his payment and entry of September 5, 1856.

The defendants in error thereupon insist that the question here, and the only Federal question brought here by the record, arises out of the contentions above enumerated, and that the sole question to be determined is sufficiently stated in the opinion of the supreme court of Iowa as being "whether under the railroad grant the right of the plaintiff's grantor attached to the land prior to the 19th day of July, 1856," and that this depends "on the further question whether the survey of the line of the road made on July 5, 1856, and staking out such line, can be regarded as the definite location of such line as required by the act of Congress, or whether such location should not be regarded as made until the plat of the survey was filed in the General Land Office in October, 1856." They further insist—

That the judgment of that court that the filing of the map, and not the survey in the field, definitely fixed the route, was right, and that if it is so held in this Court the plaintiff in error has no further case or other question here upon which it is entitled to demand the judgment of this Court.

Every other question than this which was contested below was within the final and exclusive jurisdiction of the State courts, and are not revived here by the pendency of the Federal question involved.

Murdock *v.* City of Memphis, 20 Wall. 590.

The decree of the supreme court of Iowa was right and should be affirmed.

O. C. TREADWAY,
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Attorneys for Defendants in Error.

The Supreme Court U. S.
FILED,
JAN 13 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SIOUX CITY AND IOWA FALLS TOWN LOT AND LAND CO., PLAINTIFF IN ERROR,

v.

THOMAS L. GRIFFEY ET AL.

No. 157.

Supplemental Brief for Defendants in Error.

Some of the citations of testimony and deductions drawn therefrom appearing in the brief for the plaintiff in error require notice.

The principal contention of the plaintiff is that since the act of May 15, 1856, does not require the filing of a map showing the definite location of the line of road nor prescribe in terms the act necessary to be done to make (evidence) a definite location of the line, that the rule on that subject laid down by this Court in Van Wyck *v.* Knevals (106 U. S, 360) and cases of kindred import does not apply.

In such a case the insistance of the plaintiff in error is (with some lack of certainty in its statement) that the

choice of the act necessary to be done to constitute definite location "was left to the companies taking under the grant to do in their own way." (Plaintiff's brief, bottom of page 9.) But at page 11 (top of page) it is said "When the act of Congress does not provide what shall be done to definitely fix the line of road it was competent for the Secretary of the Interior to determine what the Company must do before the Department would recognize its rights; and, if the regulations of the Department violate no law, the courts will not interfere or establish a different rule."

And at page 40 it is said: "In conclusion, we claim that, in the absence of any provision in the grant, the Land Department and the Railroad Company had the power to determine how the location should be fixed and what evidence of that fact should be furnished, and when it should be furnished."

These variant statements of what the rule should be lead up to the position taken by plaintiff in error, that the survey and marking of a proposed line in the field as it progressed from day to day definitely fixed the line in the sense of, and to the satisfaction of, the statutory requirement in that behalf, and this is supported by quoting the opinion of Mr. Attorney-General Cushing of February 16, 1857 (8 Opinions, 390), wherein it was held "that by surveying and marking the ~~lands~~ lines on the ground those lines are definitely fixed in so far as regards the present subject-matter; that is, to give to the State an equitable or inchoate title to the dependent lands, equal in right, at least, to that which any pre-emptor gains by commencing actual settlement."

In further aid of the contention that the act of May 15, 1856, is not to be construed by the rule as to what constitutes definite location laid down by this Court under other acts, the theory is suggested that the silence of the

act as to what should constitute definite location was intentional, and was owing to the fact that on and before its approval the lands presumably falling within the grants made by the act had been withdrawn from disposal by a telegraphic order of the Commissioner of the General Land Office dated on the 10th day of May, 1856, the inference sought to be drawn from the statement of fact being that Congress was advised of this telegraphic order of the 10th of May and legislated with that in view. (Plaintiff's brief, pp. 12 and 13). It is further contended that the withdrawal of May 10th was a valid excercise of authority by the Commissioner, and that hence when a map of definite location was in fact filed it covered lands which were already protected from settlement by a valid withdrawal.

The facts do not sustain these theories. The journals of Congress show that the act approved May 15 passed the House of Representatives on the 8th day of May and the Senate on the 9th day of May, 1856. The framers of the law could not therefore have been influenced by the withdrawal order of the 10th day of May. But the act of May 15 is not singular in the matters under discussion. Grants in precisely similar terms were made to Florida and Alabama May 17, 1856 (11 Stat. 15); to Alabama, Louisiana, Wisconsin, and Michigan June 3, 1856 (11 Stat. pp. 17, 18, 20, 21); to Mississippi August 11, 1856 (11 Stat. 30); to Minnesota and Alabama March 3, 1857 (11 Stat. 195); to Kansas, Michigan, and Wisconsin March 3, 1863 (12 Stat. 772, 797); to Wisconsin May 5, 1864 (13 Stat. 66), and to Minnesota May 12, 1864 (13 Stat. 74).

It is true that the Commissioner on the 10th day of May, 1856, in view of a contemplated grant, ordered by telegraph a general withdrawal of public land in Iowa,

and that he repeated the order by letter on the day of the approval of the act (Record, p. 40). But we contend on authority that if the said order of May 10 had remained unrevoked it could have no effect on the right of any pre-emptor who, in spite of it, had insisted on the exercise of his pre-emption right at any time before definite location. An order of withdrawal of lands along the "probable lines" of a land-grant railroad made before any route of the road had been designated by the Company or map of it filed "affected no rights which without it would have been acquired."

Kansas Pacific *v.* Atchison R.R., 112 U. S. 414.

However, the mistaken and unauthorized nature of the order of withdrawal of May 10, 1856, had been perceived and corrected before Griffey made his settlement and filing, and before the State of Iowa had conferred the grant on any company, and in fact before she had herself accepted it.

On June 19, 1856, the Commissioner, by letter to the Register and Receiver at Sioux City (received by them July 3, 1856), revoked his instructions of the 10th and 15th of May, and advised those officers "that settlements are authorized upon any of the lands thus withdrawn, and rights by pre-emption may be acquired as well to odd-numbered sections and within the six-mile limits of the line of railroad as to other lands so reserved." (Record, p. 85).

These instructions were right and remained in force until October 20, 1856, when the Commissioner by telegram of that date directed that no pre-emptions be admitted within 15-mile limits of the recent railroad grants.

This was confirmed by a letter of the same date, which gave as a reason for the order that "Diagrams showing

the exact limits and routes of road now being laid upon the maps in this Office will be forwarded to you as early as possible." (Record, p. 86.) The cause of the order of October 20 was the fact that on the 13th day of that month the map showing the definite location of the line had been filed in the General Land Office, thus enabling that Office to construct the diagrams mentioned in the Commissioner's instructions of the 20th of the same month. On pages 86, 87, 88, and 89 of the record further correspondence will be found between the Commissioner and the Register and Receiver at Sioux City showing that from the date of the revocation of the order of withdrawal of May 10, 1856, until a period long after Griffey had perfected his claim by proof and payment, the Land Department proceeded with the adjustment of the grant as to all matters dependent on definite location on a theory substantially in accordance with that which has become the rule of decision in this Court. In other words, lands were held subject to pre-emption until a map of definite location was filed in the General Land Office. We find nothing in the record indicating that the State or its grantee Company at any time during this period complained of this rule or suggested any other. On the contrary, it appears that on the 2d day of November, 1856, the Company, by its Secretary, anticipated the action of the Commissioner by itself filing in the Sioux City office a map of its located line. (Record, page 87.) This is the only evidence of concurring views between the Company and the Land Department from which a rule is deducible as to what should constitute definite location. Griffey's proceedings were all taken within that period; that is to say after the date when the attempted general withdrawal of May 10 and 15, 1856, had been abrogated, and before any map of definite location had been anywhere filed. The allowance of his entry,

therefore, on proof and payment, made September 5, 1856, was regular under the rule as to definite location then maintained in the Land Department; a rule acceded to and acted upon by the Company. The opinion of the Attorney-General, which for a time led to the establishment of a different rule by the Land Department, was not promulgated until February, 1857, or nearly six months after Griffey had become the equitable owner of the land. The contention of the plaintiff in error, to avail anything, must give to the rule relied upon retroactive effect to the destruction of rights theretofore acquired, but this would in turn be destructive of the Company's claimed rights, for the Land Department long since abandoned practice under the lead of the Attorney-General's opinion, and returned to that under which Griffey's pre-emption was allowed.

Plaintiff in error insists on the consideration by this Court of the facts relating to the pre-emptor's compliance with the requirements of the pre-emption law. We have dealt with that question at pages 16 to 22 of our original brief, and only now, in addition to what is there said, invite attention to the fact that it is settled law in this Court that a subsisting entry of record, whatever may be its defects in form or substance, "is such an appropriation of the tract as segregates it from the public domain and therefore precludes it from subsequent grants."

Hastings, etc., R.R. Co. *v.* Whitney, 132 U. S. 364.

If, therefore, it were competent to retry the facts on which the Land Department admitted Griffey's entry, and the findings of the Department were reversed, it would avail nothing to the plaintiff in error, for in that case (the land being within the granted limits as defined by the map of definite location) would have fallen back into the

body of the public domain, and would not under any circumstances have been subject to selection under the grant.

Kansas Pacific Railway *v.* Dunmeyer, 113 U. S. 629.

The only reply to this is insistance on the proposition that the day's work of the surveyors done on July 5, 1856, had already appropriated the tract under the grant. At the expense of some repetition we again point it out that that survey was unauthorized, as being executed before the acceptance of the grant by the State, and before the Company executing it had been endowed with the grant or otherwise vested with rights under it.

Such a case was before the Land Department in 1879, and was by the Secretary referred to the Attorney-General for his advice. It was held by that officer (his views being concurred in by the Secretary) that a road cannot be considered to have received an official definite location until after the acceptance by the legislature.

Southern Minnesota Railway Extension Co., Copp's Public Land Laws, vol. 2 (1882), p. 808–812.

The questions here in issue have several times been before the Supreme Court of Iowa, the cases involving the same identical questions present in this record. Upon the force of the requirement of the act of the general assembly accepting the grant and conferring it upon the Dubuque and Pacific Company, which required the filing of a map of definite location with the Governor and Secretary of State of Iowa, and in the Land Department at Washington, and upon the value to be attached to the stakes set on the 5th day of July, 1856, that court in Iowa Falls & Sioux City Ry. Co. *v.* Beck *et al.* (67 Iowa 421) said:

"The Governor signed and certified the map on the

same day (Oct. 2, 1856) and filed it in the General Land Office October 13, 1856, with the proper certificates thereon. This was the information and data from which the officers of the Federal Land Department were enabled to proceed to an intelligent and accurate adjustment of the grant. The line thus fixed remained as the established line and the railroad was afterwards constructed thereon." * * "The plaintiff claims that the title to the land passed to its predecessor when the line of road was surveyed and the stakes driven in the ground along the line. We think this position is not well taken and that the title did not pass until the maps were filed in the General Land Office so that the officers of the Government could intelligently and properly determine what land, as designated by Section, Township, and Range passed under the grant." * * "By the act of acceptance the Railroad Company was required to make the maps designating the line, and no other way was provided to ascertain the lands than by the map of the line of road." * * * "We cannot adopt the views of the plaintiff that the right to these lands became fixed and absolute by the driving of stakes in the month of July, and that the seeker of a home upon wild lands was bound to trace a line of stakes in the grass, and determine at his peril that he was not trespassing upon land that had been selected under a railroad grant. The act of the General Assembly of Iowa plainly prescribed the steps necessary to be taken by the railroad companies to entitle them to the benefits of the grant, and these acts require more than the mere survey of a line and driving stakes in the ground."

Contrary to the ground assumed by the plaintiff in error (Brief, p. 35), the rights of the defendants in error do not depend upon the relief intended to be afforded by the act of April 21, 1876. As remarked in our origi- brief (p. 23), irrespective of the act of 1876, the defendants below set up in their counter-claim and made by their proof a case under which the decree must have been in their favor. They set up the entry and purchase

of Griffey and attacked the certification to the Company as absolutely null and void.

The history of the legislation of 1876 is, that abuses or misadventures in the adjustment of railroad grants, by which the companies had profited at the expense and loss of settlers (and of which the Griffey case was an example), had so multiplied that some relief was found necessary. The course adopted was to charge the Land Department with the duty of correcting upon its records the mistakes of administration which had been made, and with the further duty of furnishing the party entitled with the evidence of such correction in the form of the patent of the United States.

It will not be contended anywhere that the issue of a patent for lands theretofore lawfully conveyed by the United States could avail anything. The theory of the act of 1876 was that patents ought to issue to settlers on entries lawfully made by them in cases where the only impediment was the existence or prior issue of form of title to a railroad company contrary to law, because of entire want of authority in the Land Department to make such prior conveyance. In that sense the act of 1876 was a direction to the Land Office to correct its own wrong. Such action by Congress was but forwarding the letter and spirit of the act of August 3, 1854 (10 Stat. 346), now section 2449 of the Revised Statutes of the United States, where, dealing with the method of passing title to lands granted by Congress and declaring that lists thereof shall be regarded as conveying a fee-simple title, it is nevertheless enacted that " where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." The fault with the act of 1876, was

that it did not supplement the justice it awarded by the further direction to the proper department to bring suit to clear the title of the settler of the cloud which the unauthorized certification had placed upon it. But this did not prevent the settler from so proceeding at his own risk and expense, and this the defendants in error did by the case made in their counter-claim, as before remarked.

The act of March 3, 1887 (24 Stat. 556), "An act to provide for the adjustment of land grants," etc., among other things supplies this defect. Its first section commands the immediate adjustment of all railroad land grants in accordance with the decisions of the Supreme Court. Its second section commands the Secretary of the Interior to demand the return of any lands erroneously certified or patented to any railroad company, and in case of neglect to so reconvey, it is made the duty of the Attorney-General to bring the necessary proceedings to cancel such certification or patent and restore the title to the United States, and by the third section it is provided that if it appear in the course of such adjustment "that the homestead or preemption entry of any *bona fide* settler has been erroneously cancelled on account of any railroad grant or withdrawal of public land from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws."

The proceedings of the defendants in error in the affirmative relief they sought run on the lines of this enactment. Their case is sustained both by the decisions of this Court and by the judgment of the National Legislature as to what justice demanded for the individual settler on the final adjustment of land grant controversies.

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